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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1942

No. 178

ILLINOIS COMMERCE COMMISSION, JOHN D. BIGGS, WILLIAM PARRILLO, ET AL., APPELLANTS,

vs.

CHARLES M. THOMSON, AS TRUSTEE OF THE PROPERTY OF CHICAGO AND NORTH WESTERN RAILWAY COMPANY

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS

FILED JUNE 25, 1942.

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[fol. 3]

IN THE DISTRICT COURT OF THE UNITED STATES, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

4020

CHARLES M. THOMSON, as Trustee of the Property of Chicago and North Western Railway Company, a Corporation, Plaintiff,

vs.

ILLINOIS COMMERCE COMMISSION, and JOHN D. BIGGS, WILLIAM PARRILLO, Frank Peska, Edwin A. Rosenstone, and Val J. Washington, Individually and as Members of and Constituting the Illinois Commerce Commission; Dwight H. Green, Individually and as Governor of the State of Illinois; George F. Barrett, Individually and as Attorney General of the State of Illinois; Thomas J. Courtney, Individually and as State's Attorney of Cook County, Illinois; Harry A. Hall, Individually and as State's Attorney of Lake County, Illinois; Lee E. Daniels, Individually and as State's Attorney of Du Page County, Illinois; Charles G. Seidel, Individually and as State's Attorney of Kane County, Illinois, and William M. Carroll, Individually and as State's Attorney of McHenry County, Illinois, Defendants

COMPLAINT—Filed March 10, 1942

To the Judges of the District Court of the United States in and for the Northern District of Illinois, Eastern Division:

The plaintiff, Charles M. Thomson, as Trustee of the property of Chicago and North Western Railway Company, presents this, his complaint, against the defendants, Illinois Commerce Commission, and John D. Biggs, William Parrillo, Frank Peska, Edwin A. Rosenstone, and Val J. Washington, individually and as members of and constituting the Illinois Commerce Commission; Dwight H. Green, individually and as Governor of the State of Illinois; George F. Barrett, individually and as Attorney General of the

[fol. 4] State of Illinois; Thomas J. Courtney, individually and as State's Attorney of Cook County, Illinois; Harry A. Hall, individually and as State's Attorney of Lake County, Illinois; Lee E. Daniels, individually and as State's Attorney of Du Page County, Illinois; Charles G. Seidel, individually and as State's Attorney of Kane County, Illinois, and William M. Carroll, individually and as State's Attorney of McHenry County, Illinois, and for cause of action says:

I

The Chicago and North Western Railway Company is a corporation duly organized and existing under and by virtue of the laws of the States of Illinois, Wisconsin, and Michigan, and for many years prior to June 28, 1935 was engaged in operating a railroad into and through the States of Illinois, Wisconsin, Michigan, Iowa, Minnesota, and other States, as a common carrier of passengers by railroad within the State of Illinois, and particularly between Chicago and other points in Illinois to and through the Counties of Cook, Lake, Du Page, Kane, and McHenry in the State of Illinois, and to points in Wisconsin, Iowa, and other States, and that said railroad had its principal place of business in the City of Chicago and State of Illinois, and was up to the time above mentioned a common carrier of passengers by railroad, subject to the provisions of the Act of Congress of February 4, 1887, entitled, "An Act to Regulate Commerce, as Amended," commonly known as the Interstate Commerce Act (U. S. Code, title 49, sections 1-22), and also subject to the provisions of a certain other Act of Congress amending and supplementing said Interstate Commerce Act, commonly known and referred to as Transportation Act, 1920 (41 Stat. L. 456).

[fol. 5] II

On June 28, 1935 Chicago and North Western Railway Company instituted a proceeding in the District Court of the United States for the Northern District of Illinois, Eastern Division, pursuant to Section 77 of Chapter VIII of the Acts of Congress relating to bankruptcy, which proceeding is still pending in this court and is entitled, "In Proceedings for the Reorganization of a Railroad. In the Matter of Chicago and North Western Railway Company, Debtor," Docket No. 60448. In said proceeding the busi-

ness, property and affairs of said Railway Company as the debtor named therein have been and are still being administered under and pursuant to the orders of the court. Plaintiff, Charles M. Thomson, is now and since July, 1939 has been the duly appointed, qualified and acting trustee of the property of said debtor, and as such has been and now is operating its railroad system and properties and conducting its business as a common carrier of persons and property in interstate commerce, as well as intrastate commerce, in the State of Illinois and the other States above mentioned, subject to the aforesaid Acts of Congress and the further amendatory and supplemental Act of Congress known as Transportation Act, 1940 (54 Stat. L. 899).

III

That the defendant Illinois Commerce Commission was created and exists under and by virtue of a law of the State of Illinois entitled, "An Act Concerning Public Utilities," approved June 29, 1921, effective July 1, 1921, and that said Commission is thereby empowered to enforce the provisions of said act, as amended (Ill. Rev. Stats. ch. 111⅔, secs. 1-95), as hereinafter set forth, and has an office in the State Capitol at Springfield, Illinois, in the Southern District of Illinois, Southern Division, and also an office in the City of Chicago in the Northern District of Illinois, Eastern Division, and is constituted as hereinafter set forth, [fol. 6] to-wit:

(1) That the defendant, John D. Biggs, is a citizen of the State of Illinois, and a resident in the Southern District of Illinois, Southern Division.

(2) That the defendant, William Parrillo, is a citizen of the State of Illinois, and a resident in the Northern District of Illinois, Eastern Division.

(3) That the defendant, Frank Peska, is a citizen of the State of Illinois, and a resident in the Northern District of Illinois, Eastern Division.

(4) That the defendant, Edwin A. Rosenstone, is a citizen of the State of Illinois, and a resident in the Northern District of Illinois, Eastern Division.

(5) That the defendant, Val J. Washington, is a citizen of the State of Illinois, and a resident in the Northern District of Illinois, Eastern Division.

That said individual defendants are the duly appointed, qualified and acting members of the Illinois Commerce Commission, and now constitute the defendant Commission.

IV

That the defendant, Dwight H. Green, is a citizen of the State of Illinois, and a resident in the Northern District of Illinois, Eastern Division, and is the duly elected, qualified and acting Governor of the State of Illinois.

That the defendant, George F. Barrett, is a citizen of the State of Illinois, and a resident in the Northern District of Illinois, Eastern Division, and is the duly elected, qualified and acting Attorney General of the State of Illinois.

That the defendant, Thomas J. Courtney, is a citizen of the State of Illinois, and a resident in the Northern District of Illinois, Eastern Division, and is the duly elected, quali-
[fol. 7] fied and acting State's Attorney of the County of Cook, in the State of Illinois.

That the defendant, Harry A. Hall, is a citizen of the State of Illinois, and a resident in the Northern District of Illinois, Eastern Division, and is the duly elected, qualified and acting State's Attorney of the County of Lake, in the State of Illinois.

That the defendant, Lee E. Daniels, is a citizen of the State of Illinois, and a resident in the Northern District of Illinois, Eastern Division, and is the duly elected, qualified and acting State's Attorney of the County of DuPage, in the State of Illinois.

That the defendant, Charles G. Seidel, is a citizen of the State of Illinois, and a resident in the Northern District of Illinois, Eastern Division, and is the duly elected, qualified and acting State's Attorney of the County of Kane, in the State of Illinois.

That the defendant, William M. Carroll, is a citizen of the State of Illinois, and a resident in the Northern District of Illinois, Eastern Division, and is the duly elected, qualified and acting State's Attorney of the County of McHenry, in the State of Illinois.

V

The Public Utilities Act of Illinois purports to confer jurisdiction upon the Illinois Commerce Commission to fix and determine reasonable passenger fares with respect to

intrastate traffic on railroads within the State of Illinois and certain other regulatory powers with respect to such intrastate rates, as more specifically set forth below. By Section 33 of said Act it is provided that such rates shall not exceed those in effect on July 1, 1921 without the consent of said Commission (ch. 111-2/3, sec. 33, Ill. Rev. Stats.). Another act of the Legislature of Illinois, ap- [fol. 8] proved May 27, 1907 (ch. 114, Secs. 154-156, Ill. Rev. Stats.), provides that it shall be unlawful for any carrier of passengers by railroad within that State to charge in excess of two cents per mile for the carriage of adult passengers, and further provides penalties of $25 to $100 for every violation, to be recovered by suit brought in the name of the State of Illinois by the Attorney General, or by States' Attorneys in the counties through which such railroads operate.

VI

This case involves questions arising under the Constitution and laws of the United States, and particularly under the Commerce Clause of and the Fourteenth Amendment to said Constitution, and the Acts of Congress known as the Interstate Commerce Act, as amended, Transportation Act, 1920, as amended, and Transportation Act, 1940, referred to above; also the amount involved in this suit is in excess of $3,000 exclusive of interest and costs. The action is of a civil nature and involves the right of this plaintiff to increase, effective as of March 8, 1942, the passenger fares chargeable by him for passenger travel over the lines of the said railroad within the State of Illinois, and particularly within the suburban area in and adjacent to the City of Chicago, pursuant to authority conferred upon the plaintiff by valid orders of the Interstate Commerce Commission issued in the exercise of its jurisdiction under the Acts of Congress aforesaid, which increased fares are in excess of those charged and collected for such travel on July 1, 1921 and are in excess of those heretofore authorized by the Illinois Commerce Commission and in some instances are in excess of two cents per mile, all as more particularly set forth below. The jurisdiction of this court is invoked pursuant to the provisions of sections 24(1), 24(8), and 266 of [fol. 9] the Federal Judicial Code (U. S. Code, title 28, sections 41(1), 41 (8), and 380).

VII

Up to and including March 7, 1942, plaintiff has been collecting fares for the transportation of such intrastate passengers in Illinois, rates and charges pursuant to authority received by Chicago and North Western Railway Company under a report and order of the Interstate Commerce Commission issued October 6, 1925, in a proceeding entitled, "In the Matter of Intrastate Rates Within the State of Illinois," No. 11703 (102 I. C. C. 479), a copy of which is hereto attached, made a part hereof, and marked Exhibit A.

The charges authorized in said order were applied and collected by Chicago and North Western Railway Company from and after the 20th day of October, 1925, upon filing of tariffs with the Interstate Commerce Commission. On the 23rd day of October, 1925, an interlocutory injunction was entered in the District Court of the United States for the Northern District of Illinois, Eastern Division, by a specially constituted court of three judges, wherein the persons who were then the members of the Illinois Commerce Commission, Governor, Attorney General, and several State's Attorneys as aforesaid were enjoined from commencing any suit or proceeding to enforce the provisions of the Statutes of Illinois against the said Railway Company on account of its putting into effect, maintaining, charging and collecting within the State of Illinois, intrastate commutation passenger rates, fares and charges established by said tariffs pursuant to the said Interstate Commerce Commission order, Exhibit A, and were restrained from arresting, molesting or otherwise interfering [fol. 10] with the said Railway Company, or doing any other act or thing under the Statutes of Illinois which would prevent or tend to prevent it from putting into effect, maintaining, charging and collecting the said intrastate commutation rates, fares and charges. This plaintiff, by virtue of the orders of the court in the aforesaid bankruptcy proceeding, is now possessed of all rights previously held by said Railway Company, and has continued likewise to collect such rates, fares and charges for intrastate commutation passenger travel during the time he has been acting as Trustee of the property of said Railway Company as aforesaid up to and including March 7, 1942.

VIII

The said supplemental report and order, Exhibit A, were issued by the Interstate Commerce Commission following and in connection with a nationwide investigation of freight and passenger rates and charges in effect throughout the United States, following the close of the First World War. The purpose and effect of said order of October 6, 1925 was to require the Chicago and North Western Railway Company to increase its passenger fares with respect to intrastate commutation travel within the State of Illinois to substantially the same level as then existed with respect to interstate passenger traffic, which had previously been increased by it pursuant to order and authority of the Interstate Commerce Commission, and thus to remove undue preference and prejudice, and unjust discrimination against interstate commerce, as well as undue preference and advantage to persons traveling in intrastate commerce on its railroad lines within the State of Illinois, as more particularly set forth in Exhibit A.

The said order of the Interstate Commerce Commission was of a continuing nature and expressly provided that it [fol. 11] should remain in force until further order of that Commission. In 1934 the Interstate Commerce Commission undertook a further general and nationwide investigation with respect to then existing passenger fares of common carriers by rail, and on February 28, 1936, in said proceeding known as Docket No. 26550, Passenger Fares and Surcharges (214 I. C. C. 174), entered an order modifying all of its then outstanding orders, including those entered pursuant to Section 13 of the Interstate Commerce Act, with respect to passenger rates, fares and charges, including by specific reference its order in Docket No. 11703, being the supplemental order of October 6, 1925 set forth in Exhibit A, the purpose and effect being to limit passenger fares for one-way travel in coaches to a maximum of two cents per mile and in Pullman and parlor cars of three cents per mile, and certain other purposes not here material. This modifying order did not require any changes in the rates, fares and charges with respect to the intrastate commutation travel in the State of Illinois on the Chicago and North Western Railway Company's lines involved in this suit, but by said order the Interstate Commerce Commission retained its continuing jurisdiction over the Illi-

nois intrastate commutation passenger fares of said Chicago and North Western Railway Company.

In December, 1941, pursuant to a petition filed on behalf of virtually all of the railroads in the United States, the Interstate Commerce Commission undertook a further nationwide general investigation of both freight rates and passenger fares to determine whether or not increases of ten per cent therein should be authorized, as requested by the railroads, in order to assist them in meeting increased operating expenses then being incurred on account of (a) [fol. 12] increased wages to employes, (b) increased cost of materials and supplies, and (c) additional expenditures to safeguard their properties and operations during the war emergency. The said proceeding was entitled, Ex Parte 148, Increased Railway Rates, Fares, and Charges, 1942. By its order entered in said proceeding on January 21, 1942, the Interstate Commerce Commission authorized the railroads, including the plaintiff herein, to increase their passenger rates, fares and charges ten per cent, as more particularly appears by reference to the copy of said order hereto attached, marked Exhibit B, and made a part hereof. In its report of March 2, 1942, supporting said order, the Commission stated:

"Because of the abnormal conditions which now prevail throughout the country we are of the opinion that the increased fares proposed will yield substantial amounts of additional revenues, and that the passenger service justly and reasonably should contribute to meeting the added operating costs of the railroads.

"In an appropriate order made in this proceeding on January 21, 1942, we found that the increase in fares proposed is necessary to enable the petitioners to continue to render adequate and efficient railway transportation service during the present emergency, and that the proposed increased fares will be reasonable and lawful. We therein approved the proposed increased fares subject to a suitable rule for the disposition of fractions stated in the order.

"All our outstanding orders, as amended, authorizing or prescribing interstate and intrastate fares, or bases of fares, were modified by that order, effective concurrently with the establishment of the increased fares therein approved, to the extent necessary to permit the authorized increase to be added to the interstate and intrastate fares

approved or prescribed in, or maintained or held by virtue of, such outstanding orders. We retained jurisdiction for the purpose of determining, if need be, the lawfulness of any particular fare or fares resulting from that order. Increased fares were filed and became effective February 10, 1942.

"The foregoing findings as made in our order of January 21, 1942, are here renewed and affirmed."

[fol. 13] IX

The said 1942 order of the Interstate Commerce Commission, Exhibit B, by a specific reference, modifies its 1925 order set forth in Exhibit A, pursuant to powers granted by Congress to the Interstate Commerce Commission under Section 13 of the Interstate Commerce Act and other provisions of the Acts of Congress above referred to, so as to permit this plaintiff to increase the intrastate commutation passenger rates, fares and charges for passenger travel upon the lines of the Chicago and North Western Railway Company in Illinois, which are involved in this suit, in the same manner that fares applicable to interstate travel in said State and elsewhere were thereby authorized to be increased, and thus to preserve at the same level the rates, fares and charges applicable to both interstate and intrastate passenger travel, thereby avoiding to that extent a repetition of the undue prejudice, preference and advantage and unjust discrimination which the Commission had found to exist in its 1925 report and order, Exhibit A. Pursuant to the right and authority thus conferred upon him by the 1942 order, Exhibit B, plaintiff proceeded, on or about February 6, 1942, to file with each the Interstate Commerce Commission and the Illinois Commerce Commission, tariffs setting forth increased commutation rates, fares and charges applicable to intrastate passenger travel within the State of Illinois, to become effective March 8, 1942 and remain effective thereafter. Thereafter the Illinois Commerce Commission, on February 18, 1942, without prior notice to plaintiff and without any hearing, issued an order purporting to suspend the said tariffs as filed with it until July 6, [fol. 14] 1942, and therein it required the plaintiff to refrain from making any change in the passenger fares, rates and charges here involved from those which were in effect prior to the filing of said tariffs. Said suspension order

also specifically commanded this plaintiff to refrain from making any change in said prior rates, fares and charges by any subsequent tariff or schedule until the Illinois Commerce Commission should undertake and complete a hearing and inquiry into the propriety thereof, unless by special permission of said Commission, all of which more fully appears by a copy of said suspension order hereto attached, marked Exhibit C, and made a part hereof. Said tariffs, in addition to including the rates, fares and charges involved in this suit, also provided increases in certain classes of Illinois intrastate commutation passenger rates, fares and charges represented by additional classes of tickets of somewhat different types and multiples of rides than those in existence on October 6, 1925 when the Interstate Commerce Commission's order increasing Illinois intrastate commutation fares was issued. Notwithstanding that those additional classes of tickets represented fares of the same general character as those increased pursuant to the order of October 6, 1925, plaintiff, in deference to the suspension order of the Illinois Commerce Commission, on or about March 6, 1942 filed with each the Illinois Commerce Commission and the Interstate Commerce Commission appropriate amendments of said tariffs which had been filed with them respectively on or about February 6, 1942, the effect of which amendments was to withdraw from said previously filed tariffs the rates, fares and charges with respect to all such additional classes of tickets, and to leave [fol. 15] in effect on March 8, 1942 and thereafter said increased rates, fares and charges on those classes of tickets specifically mentioned in the report and order of the Interstate Commerce Commission of October 6, 1925, Exhibit A. The increased rates, fares and charges for intrastate commutation passenger tickets of four classes, known as (1) 10 ride bearer tickets, (2) 25 ride bearer tickets, (3) 25 ride individual tickets, and (4) 60 ride monthly individual tickets applicable between stations in Chicago and the adjacent area commonly called the suburban area or zone, are those which have now become effective through the filing and amendment of said tariffs, and are the rates, fares and charges involved in this suit.

X

Plaintiff further shows to the court that said Public Utilities Act of Illinois provides, in section 33, that all sched-

ules of rates, fares and charges shall be filed with the Illinois Commerce Commission, and that no rates shall exceed those in effect on July 1, 1921, without the consent of the Illinois Commerce Commission; and in section 34 thereof that a schedule of all the rates, fares and charges shall be published and posted in the manner and form prescribed by the said Commission; and in section 35 thereof that no service shall be rendered until the rates and other charges and classifications, rules and regulations relating thereto applicable to such service have been filed and published in accordance with the provisions of said Act; and in section 36 thereof that except upon special order of the Commission no changes in any rates, fares or charges shall be made except after thirty days' notice to the Commission and to the public, and it is provided further that the said Illinois [fol. 16] Commerce Commission shall have the power to suspend tariffs showing any such changes until the propriety of the same may be determined after hearing and decision by the said Commission, provided, however, that the period of suspension of such rate or charge shall not extend more than 120 days beyond the time when such rate or charge would otherwise go into effect, but gives to said Illinois Commerce Commission, in its discretion, authority to extend the period of such suspension for a further period not exceeding six months; by section 37 of said law it is forbidden to charge or collect a greater or less or different compensation for any service rendered than the published rates, fares or charges; by section 76 of said Act (Ill. Rev. Stats. ch. 111⅔, sec. 80) it is provided that any violation of said Act or of any order, decision, rule, regulation, direction or requirement of the said Illinois Commerce Commission, or any part or portion thereof, by any public utility or person is a separate and distinct offense, and in case of a continuing violation each day's continuance thereof shall be a separate and distinct offense, each offense being punishable by a fine of from $500 to $2,000; section 77 of said Act (Ill. Rev. Stats. ch. 111⅔, Sec. 81) provides that every person who, either individually or acting as an officer, agent or employe of a public utility, violates or fails to comply with any of the provisions of said Act, or fails to observe, obey or comply with any order, decision, rule, regulation, direction or requirement, or any part or portion thereof, of the Commission, made or issued under authority of said Act, shall be guilty of a misdemeanor and shall, upon con-

viction, be punished by a fine not exceeding $1,000, or by [fol. 17] imprisonment in the county jail not exceeding one year, or by both such fine and imprisonment.

XI

Plaintiff further shows to the court that under the laws of the State of Illinois above referred to it is the duty of the Illinois Commerce Commission and of the Attorney General of the State of Illinois and of the State's Attorneys of the several Counties of said State to enforce the provisions of the Constitution and the Statutes of the State of Illinois affecting public utilities, and particularly to see that violations thereof are promptly prosecuted and penalties due the State therefor are recovered and collected as provided in sections 80 and 81 of said Chapter 111⅔ and sections 154-6 of Chapter 114, Illinois Revised Statutes for 1941.

XII

The tariffs aforesaid having been filed by plaintiff with the Interstate Commerce Commission as required by Section 6 of the Interstate Commerce Act, and having now become effective, plaintiff is now prohibited by said Section 6 and other provisions of the Interstate Commerce Act and other Acts of Congress from charging or collecting any less or different rates, fares or charges for the above-mentioned tickets or for transportation of passengers at commutation rates in said suburban area than those set forth in these tariffs as amended. Should plaintiff or his agents fail to collect said rates, fares and charges set forth in these tariffs as amended, he and they would be subject to severe fines, penalties and possible imprisonment under Sections 6 and 10 of the Interstate Commerce Act and other Acts of Congress.

[fol. 18] XIII

Notwithstanding the plain provisions and requirements of the Acts of Congress aforesaid and the right and duty of this plaintiff to comply therewith, defendants are claiming that by virtue of the said suspension order, Exhibit C, and the laws of Illinois aforesaid, plaintiff is prohibited from collecting the increased rates, fares and charges set forth in the tariffs which became effective March 8, 1942 and are threatening plaintiff with the imposition of severe

fines and penalties under color of the said Statutes of Illinois because of his collection of the increased rates, fares and charges made applicable by said tariffs. In this behalf plaintiff alleges that the said increased rates, fares and charges are now the only lawful rates, fares and charges in existence with respect to the four classes of tickets above described for use in intrastate commutation passenger travel upon plaintiff's lines in Illinois. Plaintiff further alleges that by virtue of the Constitution of the United States, the Acts of Congress, the orders of the Interstate Commerce Commission aforesaid, and the filing of the above mentioned tariffs making increased rates, fares and charges effective March 8, 1942, the said increased rates, fares and charges having become effective under and by virtue of the paramount power and authority of the Federal Government, and the said Statutes of the State of Illinois and the said suspension order of the Illinois Commerce Commission are illegal and void and of no force or effect whatsoever with respect to said increased rates, fares and charges. Notwithstanding this, the defendants, individually and as members of the Illinois Commerce Commission, Governor, Attorney General, and State's Attorneys, are now threatening plaintiff and his agents with [fol. 19] prosecutions under the said State laws because plaintiff and his agents are currently collecting the said increased rates, fares and charges. Defendants further threaten, by virtue of such prosecutions, to cause severe fines and penalties to be imposed upon plaintiff as provided in the aforesaid State Statutes; they also threaten to coerce plaintiff and his agents into disregarding the now existing lawful schedule of rates, fares and charges as set forth in said tariffs effective March 8, 1942, and to obstruct and prevent plaintiff and his agents from charging and collecting the same and to subject plaintiff to multitudinous and vexatious suits to recover the said fines and penalties in the event plaintiff and his agents continue to charge and collect the said lawful rates, fares and charges pursuant to Federal authority as aforesaid, all of which attempts and threats will be carried out by said defendants unless restrained by this Honorable Court, as this plaintiff is advised and believes. Unless so restrained, plaintiff is advised and believes that said defendants will institute numerous such prosecutions against this plaintiff and his

agents and will subject plaintiff and his agents to numerous actions for heavy and excessive fines and penalties, and may attempt to subject plaintiff and his agents to arrest and possible imprisonment. By reason of such threats and impending actions plaintiff and his employes are being intimidated and prevented from contesting, in good faith, the validity of the said laws of Illinois and suspension order as applied to the increased rates, fares and charges involved in this suit, and unless said defendants are restrained as prayed for in this complaint, plaintiff will be required either to violate the Acts of Congress aforesaid and refrain from collecting the increased rates, fares and charges which he, in good faith, asserts and believes to be [fol. 20] the lawful and applicable rates, fares and charges in effect at this time, or to be subjected to the risk of the accumulative and confiscatory penalties and punishments which may be imposed as a result of the threatened action of defendants.

XIV

The value of the property employed by plaintiff in furnishing passenger service in said suburban area and required solely because of such service is considerably in excess of $20,000,000. As found and stated by the Interstate Commerce Commission in its 1925 report and order, Exhibit A, the expenses and taxes incurred by the Chicago and North Western Railway Company in performing its passenger service in the said suburban area exceeded by nearly $2,000,000 per year the total revenues derived from its rates, fares and charges collected from the users of such service prior to the twenty per cent increase which was authorized by the Interstate Commerce Commission and went into effect in 1925, and it was then estimated by the Commission that after such twenty per cent increase there would still remain a deficit of some $600,000 annually, resulting from the furnishing of such suburban service. Plaintiff asserts that since 1925 the expenses necessarily incurred in the furnishing of said suburban service have greatly increased but there has been no increase in the rates, fares and charges for such service since 1925; that by reason thereof the furnishing of said service by the plaintiff has heretofore been accomplished at a total expense considerably in excess of the total revenues derived from the passenger traffic utilizing such service and the

service is still being furnished at a loss and without any return upon the aforesaid property value. The recent or-
[fol. 21] der of the Interstate Commerce Commission authorizing an increase in said charges, Exhibit B, affirmatively finds the authorized increase in fares to be necessary in order to meet in part the increased operating expenses now being incurred by the railroads generally, including this plaintiff, and to enable them and him to continue to render adequate and efficient railway transportation service during the present emergency. The rates, fares and charges being collected for the aforesaid intrastate commutation passenger service furnished by plaintiff in Illinois prior to the increased rates, fares and charges effective March 8, 1942 were unreasonable, noncompensatory, and afforded no return whatsoever upon the investment in the property devoted to such service. The commutation rates, fares and charges even as increased March 8, 1942, are on a much lower basis for the most part than single ride passenger fares, being on a basis considerably lower than two cents per mile, except in a comparatively few instances where such increased commutation rates, fares and charges are on a basis slightly in excess of two cents per mile. If plaintiff is required to continue collection of such prior existing rates, fares and charges and to refrain from collecting the increased rates, fares and charges herein involved, the property of the trust estate which is now being administered by this plaintiff as trustee would be taken without due process of law and confiscated contrary to and in violation of the Fourteenth Amendment of the Constitution of the United States.

XV

If the defendants should prevail in their threatened attempts to enforce the collection by plaintiff of said prior existing rates, fares and charges, the results would be (1) [fol. 22] to take without due process of law and confiscate the property of the trust estate of Chicago and North Western Railway Company now being administered by plaintiff under direction of the District Court of the United States for the Northern District of Illinois, Eastern Division, (2) to revive the undue, unreasonable and unjust discrimination against and to interfere with and obstruct interstate commerce that the Interstate Commerce Com-

mission heretofore has found to exist, (3) to revive an undue and unreasonable advantage and preference between persons and localities in favor of intrastate commerce and against interstate commerce likewise heretofore found to exist, and (4) to require plaintiff to violate the Acts of Congress aforesaid and be subjected to the severe fines and penalties therein provided.

XVI

The collection of said increased rates, fares and charges will supply plaintiff with urgently needed additional revenue with which to continue furnishing the said suburban passenger service and, at the same time, to meet the unusual emergency demands currently being made upon plaintiff for the furnishing of transportation in connection with the war activities of the United States Government. The threatened interference with and obstruction to plaintiff in his proposed continued collection of said increased rates, fares and charges, if not restrained by this Honorable Court, will result in immediate and irreparable loss and damage and subject plaintiff to the risk of a continuing, day by day, accrual of the heavy penalties prescribed by the aforesaid Illinois Statutes. The loss of revenues to plaintiff, should defendants succeed in preventing his collection of these lawful increased rates, fares and charges, will be in the aggregate well in excess of $60,000 per year. It would be impossible for plaintiff later to recover the in-
[fol. 23] crease because of the many thousands of passengers whose identity largely would be unknown to plaintiff, and because collection would involve the prosecution of a multiplicity of suits for small individual amounts. The interference with interstate commerce now threatened by the defendants immediately results from the said suspension order, Exhibit C, which was made without notice or hearing and there exists no plain, speedy or efficient remedy available to the plaintiff at law or in equity in the courts of the State of Illinois by which the validity of said suspension order may be determined. Plaintiff is informed and believes and on information and belief alleges that before he could proceed to have an application for a temporary injunction herein heard on notice, defendants, unless immediately restrained by order of this court, will commence and prosecute penalty and other actions against the plain-

tiff under the Illinois Statutes above referred to, and will otherwise harass and hinder plaintiff and his agents in their collection of the lawful rates, fares and charges now in effect, including in such measures of hindrance and harassment the possibility of arrest and prosecution of plaintiff, his agents and servants involved in the collection of said rates, fares and charges.

Wherefore plaintiff, being without adequate remedy at law in the premises, prays:

1. That the court find and declare said increased rates, fares and charges established by said tariffs, effective March 8, 1942, to be the duly established and lawful rates, fares and charges which this plaintiff is now entitled and required to collect for the transportation of passengers in intrastate suburban passenger service in Illinois upon the [fol. 24] four classes of tickets described in the foregoing complaint.

2. That the court find and declare that the prior existing rates, fares and charges, the collection of which defendants are seeking to enforce upon plaintiff, are and were noncompensatory and confiscatory and the enforcement of their collection, in lieu of the increased rates, fares and charges would deprive plaintiff and the estate of which he is Trustee of property without due process of law and deny him, as such Trustee, the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States.

3. That the court find and declare that, in view of the recent general increase in passenger rates, fares and charges covering the transportation of passengers in interstate commerce, the continued collection of the prior existing rates, fares and charges with respect to the intrastate commutation passenger traffic of plaintiff in Illinois, instead of the increased rates, fares and charges established by the tariffs filed by plaintiff, effective as of March 8, 1942, would revive and bring about undue, unreasonable, unjust and unlawful discrimination against interstate commerce and would constitute an undue and unreasonable advantage and preference, as between persons and localities, in favor of intrastate commerce as against interstate commerce.

4. That the defendants named in this complaint, and each and all of them, their officers, servants, employes, agents

and attorneys, and other persons in active concert with, participating with or acting under the control or authority of each and all of said defendants, be enjoined, perpetually, from enforcing or attempting to enforce the aforesaid laws of the State of Illinois or the said suspension order of the [fol. 25] Illinois Commerce Commission with respect to the increased rates, fares and charges involved in this action, and be enjoined from commencing any action or actions or instituting any legal proceedings for the collection of any fines or penalties, or from arresting plaintiff or any of his agents, or attempting to secure the conviction or imprisonment of plaintiff or any of his agents on account of any alleged violation of the laws of the State of Illinois or the said suspension order or other orders of the Illinois Commerce Commission because of the collection of said increased rates, fares and charges by plaintiff or his agents, and be enjoined from in any manner doing any act which would prevent or tend to prevent plaintiff and his agents from charging and collecting the increased rates, fares and charges established by said tariffs effective March 8, 1942, and from molesting or interfering with plaintiff and his agents in any respect whatsoever with respect to their collection of the said increased rates, fares and charges.

5. That this court find and declare that, unless a temporary restraining order be granted, as prayed for herein, without notice, immediate and irreparable injury, loss and damage will result to the plaintiff before a notice can be served and a hearing had herein for a temporary injunction; and that the court thereupon grant and cause to be issued herein a temporary restraining order restraining and enjoining said defendants, their officers, servants, employes, agents and attorneys, or other persons acting under them, as aforesaid, and each and all of them, from doing any of the above mentioned acts or things until a hearing may be had herein upon this plaintiff's application and prayer for a temporary injunction, such hearing to be had upon not less than five days' notice but within ten days [fol. 26] from the granting of such temporary restraining order, which shall expire by its terms at the expiration of ten days from the granting thereof.

6. That upon the granting and issuance of said temporary restraining order, this Court shall fix a time, not less than five days nor more than ten days thereafter, for hear-

ing the application of this plaintiff hereby made for a temporary injunction to be issued by this Court restraining and enjoining said defendants, their officers, servants, employes, agents and attorneys, or other persons acting under them as aforesaid, and each and all of them, from doing any of the above mentioned acts or things until a hearing may be had herein upon this plaintiff's application and prayer for a perpetual injunction and until the final hearing and determination of this cause or the further order of this Court.

7. Plaintiff prays that on final hearing hereof said order of injunction may be made perpetual, and that the plaintiff may have such other, further or different relief as to your Honors may seem meet.

Charles M. Thomson, Trustee of the property of Chicago and North Western Railway Company. William T. Faricy, Nye F. Morehouse, P. F. Gault, Attorneys for Plaintiff, 400 West Madison Street, Chicago, Illinois.

[fol. 27] *Duly sworn to by Charles M. Thomson. Jurat omitted in printing.*

[fol. 28] EXHIBIT "A" TO COMPLAINT

INTERSTATE COMMERCE COMMISSION

No. 11703

In the Matter of INTRASTATE FARES WITHIN THE STATE OF ILLINOIS

Submitted August 1, 1925. Decided October 6, 1925

Commutation fares of the Chicago & North Western Railway Company for the transportation of passengers within the State of Illinois found to be unduly preferential of intrastate passengers, unduly prejudicial to interstate passengers, and unjustly discriminatory against interstate commerce. Undue preference, prejudice, and discrimination ordered removed by appropriate increases in the intrastate fares.

R. V. Fletcher, R. N. Van Doren, and *P. F. Gault* for Chicago & Western Railway Company.

H. M. Slater and *Morton F. Culver* for Public Utilities Commission of Illinois.

A. E. Huenergager, Theo. Forby and *Joseph L. Bishop* for City of Zion, Ill., and the Zion Institutions and Industries.

Keig & Sherwood for City of Lockport, Ills., and Chicago Commuters' Association.

Howe, Fordham & Kreamer and *Van Dorf Gray* for Suburban Citizens' Committee.

SUPPLEMENTAL REPORT ON FURTHER HEARING

McCHORD, *Commissioner:*

In the original report in this proceeding, 59 I. C. C. 350, we required carriers by rail in the State of Illinois to make certain increases in their intrastate passenger fares corresponding to the increases theretofore authorized for the eastern group, which includes the Illinois district, in order to remove undue prejudice to interstate passengers, unjust preference of and advantage to intrastate passengers, and unjust discrimination against interstate commerce. We announced that our findings were exclusive of commutation and other multiple forms of tickets, and that such excluded fares and charges would be reserved for further consideration.

In a supplemental report, 77 I. C. C. 173, certain intrastate commutation passenger fares of the Chicago, Lake Shore & South Bend Railway Company, an electric carrier, were ordered increased so that they should not be less than its like fares for corresponding distances, in effect at the same time, for the transportation of passengers in interstate commerce upon its lines within the State of Illinois and between points in that State and points in the State of Indiana. The record now before us was made in part in December 1920, in so far as it concerned the fares of the Chi- [fol. 29] cago & North Western Railway Company, and was completed at a very recent date. This report will be confined to a consideration of the commutation fares of the Chicago & North Western Railway Company, hereinafter called the North Western or petitioner, on the record made following its petition for further hearing filed herein May 15, 1925. No appearance was entered at the later

hearing for the Illinois Commerce Commission or for the Governor of the State, although notified, and although a representative of the State commission, who had appeared for its predecessor, the Public Utilities Commission, throughout the earlier hearing, was present during a part of the later hearing and made a formal statement in the record.

In general terms, the matter in issue at this time is, whether the North Western should, as it seeks authority to do, increase its commutation fares within the State of Illinois by amounts not exceeding 20 per cent above the level of such fares in effect August 25, 1920. The multiple forms of tickets issued by petitioner are known as 10-ride and 25-ride bearer tickets, limited to one year from date of sale; and 60-ride monthly individual tickets, limited to the calendar month for which sold. Petitioner also issues a few 25-ride individual tickets and 30-ride family tickets, both limited to one year. Those forms are not of great importance here but will be noted when considered.

Tickets to bearer good for 10 rides are today upon the level in effect in April, 1897, increased by only 10 per cent June 10, 1918. Bearer tickets for 25 rides have changed their level since 1894 only to this extent; April 10, 1912, approximately 10 cents per ticket, or four-tenths of a cent per ride, was added; and June 10, 1918, these rates were increased by 10 per cent. Monthly tickets, good for 60-rides by one individual during a calendar month, have had no general changes for 34 years other than an increase ranging from 30 to 40 cents per ticket, or from one-half cent to two-thirds of a cent per ride, effective April 10, 1912; and June 10, 1918, these rates were increased by 10 per cent. In view of the changes which have occurred since the year 1914, of the increased cost of labor and materials, and of the higher levels of other charges for transportation, the static condition of these commutation fares is noticeable. The 10 per cent increases were made pursuant to general order No. 28 of the Director General of Railroads.

The North Western serves three main suburban districts; That west of Chicago along the line of its Galena division; that northwest of the same place along the line of the Wisconsin division; and that north of Chicago on the line of the Milwaukee division. The latter is, perhaps, best known as the Lakeside district, and the rails serving it extend through Evanston, Waukegan, and Winthrop Harbor, be-

yond which they cross the Wisconsin-Illinois line to Kenosha and Milwaukee, Wis. The district served by the Wisconsin division is along the rails extending from Chicago through Crystal Lake and Harvard, Ill., beyond the latter point crossing the State Line into Wisconsin, and thence through Janesville and Madison, Wis. The district served by the Galena division needs no further description than that it is substantially due west of Chicago. This account omits branch lines.

[fol. 30] The districts served by petitioner are well settled and the commutation travel along its lines is very great. The main drift of such travel is to and from Chicago, and peak loads are carried inbound in the morning and outbound during the afternoon. To accommodate its patrons petitioner has developed a suburban train service in addition to its through, or long-distance, interstate train service, and holders of commutation tickets are entitled to travel on through trains as well as on suburban trains, subject to certain necessary operating restrictions. There are suburban trains which begin and end their trips at Wisconsin points, such as Kenosha; holders of through commutation tickets from other Wisconsin points, such as Lake Geneva and Janesville, may travel on through trains or on suburban trains to and from Chicago; and it is apparent, therefore, that interstate traffic, through and suburban, and suburban intrastate traffic are quite thoroughly mixed.

The basic charge for one-way passenger fares interstate and intrastate in Illinois and Wisconsin is the same, 3.6 cents per mile; commutation fares for travel between points in Illinois and points in other States, including Wisconsin, were increased 10 per cent June 10, 1918, at the time that such fares applying intrastate in Illinois received a like increase, and 20 per cent effective August 26, 1920; but no increase of 20 per cent has yet been made in commutation fares between points wholly within Illinois. The results are illustrated by what is shown below:

Between Chicago, Ill. and	Distance in miles	One way fare cents	One trip 10-ride ticket cents	One trip 25-ride ticket cents	One trip 60-ride monthly ticket cents
Winthrop Harbor, Ill.	45	161	80.3	70.4	21.4
Kenosha, Wis.	52	188	121	102	29.5
Richmond, Ill.	61	219	115	A 93.5	None
Genoa City, Wis.	63	226	143	A 116	"

A—Individual tickets.

Kenosha is 7 miles beyond Winthrow Harbor, and the difference between the one-way fares from those places to Chicago, 27 cents, is approximately correct. That there is something wrong with the levels of the 10-ride and 25-ride commutation fares from the same places is obvious, for the differences per ride are about 41 and 32 cents respectively. Kenosha is the extreme limit on the Milwaukee division proper from which 60-ride monthly tickets are sold. Plainly, the price of this type of ticket from Kenosha is based upon the rate scheme applicable from points just south thereof and no deduction can be made therefrom. Looking at the State line on the Wisconsin division, the additional distance from Chicago, about 2 miles, explains the difference, 7 cents, between the one-way fares from Genoa City and from Richmond; but this greater distance does not justify the spreads of 28 cents and 22 cents per ride in the 10-ride and 25-ride tickets from those places. The explanation has been given: Commutation fares for travel between points in Illinois and points in Wisconsin were increased 20 per cent in August, 1920, whereas such fares within the State of Illinois have not been so increased. [fol. 31] It is conceivable that the differences in levels as between commutation fares interstate and intrastate, illustrated above, might indicate that the interstate levels were too high. Looking at the levels applicable at Kenosha, and bearing in mind that the approved rate per passenger-mile is now 3.6 cents, the passenger-mile revenues are as follows: On 10-ride tickets, 2.33 cents; on 25-ride tickets, 1.96 cents; and on 60-ride monthly tickets, 0.49 cent. Compare these revenues with the similar revenues from Winthrop Harbor: On 10-ride tickets, 1.80 cents; on 25-ride tickets, 1.58 cents; and on 60-ride monthly tickets, 0.48 cent. But this comparison must wait upon the returns shown by petitioner before a deduction can be made therefrom.

By elaborate exhibits, the North Western attempts to show that its suburban Illinois intrastate fares, as a whole, fail to pay the actual out-of-pocket costs of performing the services. Before looking at the results indicated, however, it may be well to see just what these services are. Suburban services are maintained from points other than Chicago. The latter, however, as the hub of petitioner's system, is the origin or destination of practically all sub-

urban trains, and other services are — comparatively little importance. At test made of traffic for two Sundays in 1925 shows an average per Sunday of 59 suburban and 54 through trains in and out of petitioner's Chicago terminal, and these suburban trains carried an average of 8,126 passengers per Sunday as against an average of 8,046 passengers per Sunday carried on the through trains. About the same time a test was made of the traffic handled on two successive week days, with average results per days as follows: In and out of the Chicago terminal, 193 suburban trains carrying 67,977 passengers, and 65 through trains carrying 8,156 passengers. To accommodate this heavy daily traffic, approximately 34,000 passengers inbound to Chicago every week-day morning and an equal number outbound every week-day afternoon, petitioner has provided 533 passenger coaches and 83 locomotives, which are used exclusively in this service. This equipment is of as high grade as is owned and used by the North Western in through transportation. Suburban coaches, however, average only 40.5 miles per day, whereas coach runs for the whole road operated by petitioner averages 133.5 miles per day. This result is due to the peak character of suburban travel morning and evening. A count of the suburban train movement in and out of the Chicago terminal during week days in December, 1924, shows as follows: Trains from midnight to noon, total 92, of which 72 moved between 6:00 a. m. and 9 a. m.; trains from noon to midnight, total 108, of which 47 moved between 5 p. m. and 6 p. m.; and 75, including these 47, moved between 4 p. m. and 8 p. m. Storage space for these coaches must be provided at Chicago and along the rails of petitioner at lay-over points. At Chicago 23,500 feet of track are used exclusively for the storage of suburban coaches, and other terminal and lay-over points have a total storage capacity in excess of 33,500 feet used exclusively in this service. The storage time of coaches in these yards approximates an average of 10 hours per coach per day of 24 hours, and approximately 890 coaches are stored in these yards each day. These figures mean that, in addition to such outbound and inbound train trips as require no storage, the coaches devoted to this service are utilized for an average of 14 hours per day, and storage is used equal to one and two-thirds times each per day for 533 coaches. While in storage at the yards these coaches are cleaned; and the record shows that coaches used

in suburban service need and receive more frequent and more thorough cleaning than road equipment gets.

[fol. 32] Within the suburban zone, moving over the same trackage layout and using the same terminals, petitioner's suburban trains, through trains, and other equipment movements must be governed by interlocking plants. There are 24 of these plants, which employ 135 men and control 1,207 switches. From midnight to midnight there are 8,382 movements through them. Of these movements 3,247, or more than 38 per cent, are of suburban trains; 1,033, or a little over 12 per cent, are of through trains and only 417, or less than 5 per cent, are of freight trains. Other movements are of switch trains and switch engines. The small percentage of freight trains handled in this zone is due to the provision of special freight lines and the virtual exclusion of all but local freights from the passenger tracks in the zone. For purely passenger service, the record shows, all through traffic on each division could be handled on two main-line tracks. To handle the traffic as it is, through and suburban mixed, the Milwaukee division, running north from the Chicago terminal, has six tracks, which are reduced to four tracks within three miles, where they are further reduced to three tracks extending eleven miles, and beyond that the two-track line is maintained.

The percentage of miles run to miles paid, confining our attention to the suburban districts of petitioner, for both trainmen and enginemen ranged from 93 to 99 per cent for through service, whereas in the suburban service the range is from 52 to 87 per cent. This is due to the character of the suburban service as described above.

We come now to consider the statistical and accounting exhibits of record and, without reciting these in the minute detail in which they are shown, the substantial facts to be drawn therefrom are as follows: Petitioner's entire system had 42,748 employees in 1912, 51,729 in 1918, and 47,288 in 1924. These worked in 1912, 130,195,230 hours, estimated; in 1918, 154,444,349 hours, actual; and 125,436,891 hours, actual, in 1924. The average compensation per hour was 25.08 cents in 1912, 46.8 cents in 1918, and 61.49 cents in 1924. Put in another way, the average annual compensation per employee was $764 in 1912, $1,397 in 1918, and $1,631 in 1924. Taxes for the entire system were $3,422,838 in 1912, $5,497,481 in 1918, and $9,348,842 in 1924. As com-

pared with prices paid in 1912, the costs of materials during 1924 were higher by the percentages which follow: Oak Cross-ties, 97 per cent; switch and bridge ties, 74 per cent; rails, 58 per cent; and coal, 37 per cent. Plainly stated the costs of most things petitioner must buy have been increased by from 50 per cent to more than 120 per cent above their costs prior to the World War; whereas, commutation fares for approximately 60,000 intrastate rides per day, as compared with approximately 8,000 through interstate rides per day, have been increased only 10 per cent during the same period.

Upon the showing made, petitioner has failed to earn 5.75 per cent upon the cost of its road and equipment, including materials and supplies, since 1920; and the shortage for the calendar year 1924 was more than $12,000,000. While the investment figure does not necessarily indicate the value of petitioner's property, in the instant circumstances we may [fol. 33] use it in estimating the cost of the particular service. Using accounting methods approved by us, petitioner estimates that the expenses and taxes incurred in the performance of its suburban services, above described, exceed the revenues derived therefor by more than $1,297,900. A further estimate indicates that, even though commutation fares for intrastate transportation in Illinois be increased by 20 per cent as here sought, there will still be a deficit in the revenues from this service in excess of $600,000. In other words, petitioner's suburban fares in the Chicago district, interstate and intrastate, do not pay and will not pay anything toward a return upon petitioner's investment; and the increases sought are expected merely to reduce the out-of-pocket loss.

As between the cost of and the returns from the service the showing leaves a wide margin adequate to cover possible error, and it may therefore be accepted, for present purposes, that the figures are approximately correct and illustrate an actual condition. The greater part of the deficit is chargeable to the intrastate service, aggravated by the lower bases of intrastate fares.

Petitioner's commutation fares were initiated so long ago that no one now has personal knowledge of the scheme upon which they were first constructed; however, they maintain a relationship to mileage. No competitive influences holding these fare levels down are shown, but there are

other carriers serving the same general suburban districts, and petitioner attempts to make its commutation fares relatively just as between the three intrastate districts served by it and without undue preference or prejudice to any district or place. Therefore, it will not be necessary to examine all the varieties of multiple tickets or the rates and charges to all stations. The situation here presented may be fully shown by taking stations at distances approximately 5 miles apart and following the line of the Milwaukee division northward from petitioner's Chicago terminal. Nor will it be necessary to show present fares, inasmuch as the rates sought are in every instance merely 20 per cent higher than the present rates, subject to a maximum charge of 2 cents per mile in deference to the State statute.

[fol. 34] Statement Showing Proposed Commutation Fares Between Chicago and Stations on C. & N. W. Ry.
Also the Rate Per Ride and the Rate Per Mile.

Milwaukee Division

Between Chicago and Illinois	Distance From Chicago	One Way Fare	10-Ride Bearer—Limit 1 Year as Increased by 20%			25-Ride Bearer—Limit 1 Year as Increased by 20%			60-Ride Monthly Individual Limited Calendar Month—as Increased by 20%		
			Rate per Ticket	Rate per Ride	Rate per Mile	Rate per Ticket	Rate per Ride	Rate per Mile	Rate per Ticket	Rate per Ride	Rate per Mile
		$	$	Cents	Cents	$	Cents	Cents	$	Cents	Cents
Cuyler	5.4	.21	A 1.10	11.0	2.00	2.45	9.8	1.81	5.28	8.8	1.63
Calvary	10.4	.39	1.98	19.8	1.90	4.23	16.9	1.62	7.79	13.0	1.25
Kenilworth	15.2	.56	2.78	27.8	1.83	5.88	23.5	1.55	8.72	14.5	.95
Braeside	20.7	.76	3.77	37.7	1.82	8.00	32.0	1.54	9.45	15.7	.76
Fort Sheridan	25.7	.94	4.23	42.3	1.64	9.05	36.2	1.41	10.30	17.2	.67
Lake Bluff	30.2	1.10	5.68	56.8	1.88	12.02	48.1	1.59	11.56	19.3	.64
Waukegan	35.9	1.30	*7.20	72.0	2.00	15.32	61.3	1.71	13.20	22.0	.61
Zion	42.1	1.53	*8.40	84.0	2.00	19.14	76.6	1.82	14.52	24.2	.57
Winthrop Harbor	44.4	1.61	*8.80	88.0	2.00	21.12	84.5	1.90	15.45	25.7	.58

* Rate based on 2¢ per mile per ride.
A No change.

[fol. 35] The above table discloses that the rates sought are reasonably low. It is not feasible to enter into all the statements of comparable fares in effect elsewhere, submitted by petitioner to show how reasonable these charges are for distances exceeding 20 miles. In Commutation Fares on *N. Y., N. H. & H. R.*, 101 I. C. C. 703, we approved certain increased commutation fares between points served by the New Haven and the Grand Central Station in New York City. Taking comparable distances, the 60-trip monthly tickets there approved and here proposed show the following relationships:

	Distance Miles	Fare	Average Per Ride Cents	Rate Per Mile Cents
Approved	30.3	16.48	27.46	.9
Sought	30.2	11.56	19.3	.64
Approved	35.7	17.60	29.33	.82
Sought	35.9	13.20	22	.61
Approved	42.1	20.21	33.68	.8
Sought	42.1	14.52	24.2	.57
Approved	44.4	21.32	35.53	.8
Sought	44.4	15.45	25.7	.58

One direct method of measuring the levels of the rates sought by petitioner is to compare them with the levels of similar commutation fares now in force on the Chicago, North Shore & Milwaukee Railroad, an electric carrier, ordinarily referred to as the North Shore Line or North Shore Electric. The North Shore Line uses the elevated "Loop" tracks in the heart of Chicago, which use carries with it transfer privileges throughout Chicago by way of the elevated system. North of Chicago to Milwaukee the North Shore serves the same general district and communities and substantially parallels the rails of petitioner which constitute its Milwaukee Division. Beyond the 15-mile zone all 60-ride commutation fares sought by petitioner will be very much below the cheapest fares available by the North Shore. For the zone from 15 miles to 30 miles north of Chicago petitioner's proposed 10-ride tickets, and for the zone 15 miles to 35 miles north of Chicago its 25-ride tickets, will be cheaper than similar fares by the North Shore.

Obviously, many reduced-fare multiple tickets usable by bearer offer temptations to defeat one-way fares, which are upon a materially higher basis from points beyond; and this temptation the commutation fares here sought, or any basis below standard fares, would perhaps only lessen.

Without following the figures in detail, it is clear that from points in Wisconsin, such as Janesville, Genoa City, Lake Geneva, and Kenosha, to Chicago, both single-trip and multiple-trip fares may be defeated by using single-trip, or, where they are in effect, multiple-trip, tickets to points in Illinois close to the Wisconsin State Line, such as Harvard, Richmond, or Winthrop Harbor, and from those points using multiple-trip tickets to Chicago. The record indicates not only the possibility of this practice but that it has grown during the years since 1920.

In this connection it should be said that the increased commutation fares here considered were filed by petitioner with the Illinois Commerce Commission, to become effective February 15, 1925, and have been suspended until December 15, 1925. The same schedules were at the same [fol. 36] time filed here, and were suspended in respect of their interstate application. In that situation we sought the cooperation of that commission for the disposition, through a joint hearing and conference agreeable with the cooperative plan, of the issues thus presented, but failed in the effort.

We find that there are no conditions within Illinois justifying the maintenance by petitioner of intrastate commutation passenger fares and of charges for multiple-trip commutation tickets therein lower than the corresponding fares and charges applicable to the interstate transportation of passengers by petitioner to, from, or through the State; and that the maintenance of such intrastate fares and charges lower than the corresponding just and reasonable interstate fares and charges established and maintained by petitioner pursuant to the authority heretofore given by this commission in Ex Parte 74 gives an undue preference and advantage to persons traveling in intrastate commerce on petitioner's lines within said State and subjects persons traveling in interstate commerce on petitioner's lines to, from, or through the State to undue prejudice and disadvantage, and unjustly discriminates against interstate commerce; which undue preference and prejudice and unjust discrimination should be removed.

We further find that, to remove the undue preference and prejudice and unjust discrimination found to exist, petitioner should establish and maintain intrastate commutation passenger fares and charges for multiple-trip commutation tickets for the transportation of passengers

on its lines within Illinois which shall be respectively higher by 20 per cent than those in effect on said lines and applicable to said transportation on August 25, 1920, subject to a maximum of 2 cents per mile.

An order in accordance with the foregoing findings and conclusions will be entered.

[fol. 37] ORDER

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 6th day of October, A. D. 1925.

No. 11703

IN THE MATTER OF INTRASTATE RATES WITHIN THE STATE OF ILLINOIS

This case being a proceeding instituted by the commission upon petition filed, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the commission having, on the date hereof, made and filed a supplemental report on further hearing containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered, That the Chicago & North Western Railway Company, party to this proceeding, be, and it is hereby, notified and required to cease and desist from practicing the undue prejudice, undue preference and advantage, and unjust discrimination found in said supplemental report to exist, and to establish, put in force, and maintain multiple-trip and commutation fares for the transportation of passengers in intrastate commerce on said carrier's lines within the State of Illinois which shall be respectively higher by 20 per cent than those in effect on said lines and applicable to said transportation on August 25, 1920, subject to a maximum of 2 cents per mile.

It is further ordered, That this order shall become effective on or before November 23, 1925, upon notice to this commission and to the general public by not less than five days' filing and posting in the manner prescribed in section 6 of the interstate commerce act, and remain in force until the further order of this commission in the premises.

And it is further ordered, That a copy of this order be served upon the above-named common carrier, party to said proceeding.

By the commission.

George B. McGinty, Secretary. (Seal.)

[fol. 38] EXHIBIT "B" TO COMPLAINT

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 21st day of January, A. D. 1942.

Ex Parte No. 148

Increased Railway Rates, Fares, and Charges, 1942

ORDER

It appearing, That, by petition dated December 13, 1941, as amended, the petitioning class I railway companies of the United States, by petition dated December 22, 1941, as amended, the petitioning class II and class III railway companies of the United States, and certain other railway companies therein mentioned, and by petition dated December 16, 1941, certain common carriers by water engaged in the transportation of passengers, seek authority to increase by 10 percent their freight rates and charges, with certain exceptions not necessary to describe herein, and their passenger fares, except fares specially published for application to members of the military or naval forces of the United States traveling on furlough, and fares published as extra fares, applicable in connection with transportation on particular trains; and that the proper authorities of all States have been notified of this proceeding, and similar application has been or will be made to the regulatory authority of the respective States for permission to increase similarly petitioners' intrastate rates, fares, and charges;

It further appearing, That said petitions have been heard, the proceeding has been submitted, and investigation of the matters and things involved has been made; and that in the hearing and investigation of these matters the Commission has had the cooperation and advice of a committee duly

appointed for the purpose and consisting of members of the State regulatory authorities;

It further appearing, That the increase in fare proposed is necessary to meet, in part, increased operating expenses incurred or to be incurred by said petitioners because of the payment by them of (a) increased wages to employes, (b) increased cost of materials and supplies, and (c) additional expenditures to safeguard petitioners' properties and operations during the present emergency; the details of which will be stated in a report hereafter to be made respecting the proposed increased freight rates and charges;

And the Commission does hereby find that the increase in fares proposed is necessary to enable petitioners to continue to render adequate and efficient railway transportation service during the present emergency; and that, upon consideration of said petitions and the evidence of record, that the proposed increased fares will be reasonable and lawful:

It is ordered, That the increased passenger fares as proposed by the said petitioners be, and they are hereby, approved, provided that where the total increased fares are less than $1 fractions of less than one-half cent shall be dropped and fractions of one-half cent or greater may be [fol. 39] increased to the next whole cent, and that where the total increased fares are more than $1 such fares shall end in 0 or 5, but no more than 2.5 cents shall be added to the present fares as increased by 10 percent in order to make such total fares end in 0 or 5.

It is further ordered, That all outstanding orders, as amended, of the Commission, authorizing or prescribing interstate and intrastate fares, or bases of fares, be, and they are hereby, modified, effective concurrently with the establishment of the increased fares herein approved, only to the extent necessary to permit the increase herein authorized to be added to the interstate and intrastate fares approved or prescribed in, or maintained or held by virtue of, said outstanding orders; and that a copy of this order shall be filed in the docket of each such proceeding, including those proceedings under section 13 of the Interstate Commerce Act enumerated in the order of February 28, 1936, in docket No. 26550, *Passenger Fares and Surcharges.*

It is further ordered, That all tariffs or supplements changing fares by authority of this order, which are main-

tained or held by authority of outstanding orders of the Commission, shall bear on their title pages specific reference to this order.

It is further ordered, That the increased fares herein authorized may be made effective upon not less than 10 days' notice to the Commission and to the general public by publishing, filing, and posting in the manner provided in section 6 of the Interstate Commerce Act; and that a copy of this order be served on each of said petitioners and on the Governors of the several States.

And it is further ordered, That jurisdiction be, and it is hereby, retained by the Commission, for the purpose of determining, if need be, the lawfulness of any particular fare or fares, resulting from this order.

The Commission not yet having determined the remaining issues involved, namely, those relating to the rates and charges for the transportation of freight, and services connected therewith, and for the transportation of milk and cream, jurisdiction is hereby retained for the purpose of further consideration and determination of such other issues herein.

[fol. 40] FOURTH SECTION ORDER NO. 14500

It appearing, That the Commission by its order this day entered in this proceeding, which is hereby referred to and made a part hereof, has approved certain proposed increased fares for the transportation of passengers over the lines of carriers in the United States;

It further appearing, That representations have been made by the applicant carriers in this proceeding that increased fares cannot be published and made effective in the manner authorized therein without producing in some instances charges in contravention of the long-and-short-haul and aggregate-of-intermediates provisions of section 4 of the Interstate Commerce Act; that said carriers have applied for such fourth-section relief as may be necessary to publish and make effective the said proposed increased fares authorized by the said order without relief from the provisions of section 4, and that a special case exists within the meaning of said section:

It is ordered, That carriers subject to the Interstate Commerce Act be, and they are hereby, authorized to establish the increased fares so approved without observing the

provisions of section 4 of the act, provided, that (1) the authority contained herein to maintain fares in contravention of the aggregate-of-intermediates provision of section 4 shall expire six months from the establishment of such fares; and (2) where fares established under the authority contained herein are increased by greater amounts to or from intermediate points than to or from more distant points, or where increases are made in fares to or from intermediate points and not to or from more distant points, thereby creating or increasing departures from the long-and-short-haul provision of section 4, the relief herein shall expire three months from the establishment of such fares; provided, that if applications are filed within the said three months' period for relief to continue any of such fares beyond that period, in the manner and form provided in rule XVIII of the Rules of Practice of the Commission, the fares included in and covered by such respective applications may be continued until the determination thereof by the Commission.

It is further ordered, That in instances in which fares in contravention of the provisions of section 4 are established under the authority contained herein, the schedule or schedules containing such fares shall make reference to this order in the manner required by rule 28 of Tariff Circular 20.

By the Commission.

W. P. Bartel, Secretary. (Seal.)

[fol. 41] EXHIBIT "C" TO COMPLAINT

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

30480

In the Matter of the Proposed Changes in Commutation or Excursion Fares, Applicable to Illinois Intrastate Traffic, Stated in Tariffs Ill. C. C. Nos. 1687, 1688, 1689, 1690, 1693, 1694, 1695, 1696, 1697, 1698, 1699, 1700, and 1703, of the Chicago and North Western Railway Company, Charles M. Thomson, Trustee.

SUSPENSION ORDER

By the Commission:

On February 6, 1942, the Chicago and North Western Railway Company, Charles M. Thomson, Trustee, filed with the Commission the following schedules:

Ill. C. C. No. 1687, effective March 8, 1942;
Ill. C. C. No. 1688, effective March 8, 1942;
Ill. C. C. No. 1689, effective March 8, 1942;
Ill. C. C. No. 1690, effective March 8, 1942;
Ill. C. C. No. 1693, effective March 8, 1942,
Ill. C. C. No. 1694, effective March 8 to December 31, inclusive, 1942;
Ill. C. C. No. 1695, effective daily, beginning March 8, 1942;
Ill. C. C. No. 1696, effective March 8 to December 31, inclusive, 1942;
Ill. C. C. No. 1697, effective March 8, 1942;
Ill. C. C. No. 1698, effective March 8, 1942;
Ill. C. C. No. 1699, effective March 8 to December 31, inclusive, 1942, and
Ill. C. C. No. 1700, effective March 8 to December 31, inclusive, 1942;

and on February 7, 1942, filed Ill. C. C. No. 1703, effective March 10, 1942; in which it is proposed to change commutation or excursion fares, applicable to Illinois intrastate traffic.

It appears, from an examination of the aforesaid schedules, that the Commission should enter upon a hearing concerning the propriety of the proposed changes in fares, and that, pending the hearing and the decision thereon, the said changes in fares should not go into effect.

It is therefore ordered that the proposed changes in commutation or excursion fares, applicable to Illinois intrastate traffic, stated in Tariffs Ill. C. C. Nos. 1687, 1688, 1689, [fols. 42-43] 1690, 1693, 1694, 1695, 1696, 1697, 1698, 1699, 1700, and 1703 of the Chicago and North Western Railway Company, Charles M. Thomson, Trustee, be, and the same are hereby, suspended until July 6, 1942, subject to the further order of this Commission, and no change shall be made in such fares during the said period of suspension unless authorized by special permission of the Commission.

It is further ordered that the fares thereby sought to be altered shall not be changed by any subsequent tariff or schedule until this proceeding has been disposed of, or until the period of suspension and any extension thereof has expired, unless authorized by special permission of the Commission.

By order of the Commission at Springfield, Illinois, this 18th day of February, 1942.

(Signed) Frank M. Kalteux, Secretary. (Seal.)

[fols. 44-45] IN DISTRICT COURT OF THE UNITED STATES, NORTHERN DISTRICT OF ILLINOIS

[Title omitted]

MOTION FOR TEMPORARY RESTRAINING ORDER—Filed March 10, 1942

Plaintiff moves for the entry of a temporary restraining order as prayed for in the complaint in the above entitled cause and in this behalf submits the draft order hereto attached.

In support of this motion plaintiff relies upon the facts set forth in the verified complaint herein, all of which by this reference are made a part hereof.

W. T. Faricy, Nye F. Morehouse, P. F. Gault, Attorneys for Plaintiff, 400 West Madison Street, Chicago, Illinois.

[fols. 46-47] IN DISTRICT COURT OF THE UNITED STATES, NORTHERN DISTRICT OF ILLINOIS

[Title omitted]

MOTION FOR INTERLOCUTORY INJUNCTION—Filed March 11, 1942

Plaintiff moves for the issuance of an interlocutory injunction as prayed for in the complaint in the above entitled cause and in this behalf submits the draft order hereto attached.

In support of this motion plaintiff relies upon the facts set forth in the verified complaint herein, all of which by this reference are made a part of this motion.

William T. Faricy, Nye F. Morehouse, P. F. Gault, Attorneys for Plaintiff, 400 West Madison Street, Chicago, Illinois.

[fol. 48] In District Court of the United States, Northern District of Illinois

[Title omitted]

Temporary Restraining Order—March 11, 1942

The verified complaint of the plaintiff herein having been duly filed and presented to the undersigned, and it appearing therefrom that because of the threatened day by day accumulation of heavy penalties under a state law and a state order alleged to be invalid, and because of the imminent liability of plaintiff and certain of his agents to arrest for acts believed by them to be lawful and authorized by outstanding orders of the Interstate Commerce Com. [fol. 49] mission but claimed by the defendants to be in violation of state laws and an order of the Illinois Commerce Commission, and because interference with the collection of rates, fares and charges authorized by the Interstate Commerce Commission, effective March 8, 1942, would subject plaintiff to an immediate and irreparable loss of revenues now being collected which could not be recovered by plaintiff, immediate and irreparable injury, loss and damage will result to the plaintiff unless an immediate temporary restraining order is issued, and

It appearing that under Section 266 of the Judicial Code (title 28 U. S. Code, section 380) at least five days' notice must be given to the defendants in this case of any hearing for an interlocutory injunction, during which time defendants would not be restrained from the apprehended acts hereinbefore described, which is the reason for granting this order without notice, and the court being of the opinion that such immediate and irreparable loss, damage and injury would result to the plaintiff and on motion of William T. Faricy, Nye F. Morehouse, and P. F. Gault, Attorneys for said plaintiff,

It is therefore ordered that pending the hearing on plaintiff's motion for a preliminary injunction, but not more than ten days from the entry hereof, defendants Illinois Commerce Commission, and John D. Biggs, William Parrillo, Frank Peska, Edwin A. Rosenstone, and Val J. Washington, individually and as members of and constituting the Illinois Commerce Commission; Dwight H. Green, individually and as Governor of the State of Illinois; George F. Barrett, individually and as Attorney General of the State of Illinois; Thomas J. Courtney, individually and as State's Attorney of Cook County, Illinois; Harry A. Hall, individually and as State's Attorney of Lake County, Illi- [fol. 50] nois; Lee E. Daniels, individually and as State's Attorney of DuPage County, Illinois; Charles G. Seidel, individually and as State's Attorney of Kane County, Illinois; and William M. Carroll, individually and as State's Attorney of McHenry County, Illinois, and each of them, their servants, agents, employees, attorneys and all persons in active concert or participation with the defendants or any of them be, and they hereby are, restrained and enjoined from commencing any action or actions or instituting any legal proceeding for the collection of any fines or penalties against the plaintiff or his agents on account of the filing by them of tariffs with the Interstate Commerce Commission providing for the collection of increased rates, fares and charges for 10-ride bearer, 25-ride bearer, 25-ride individual, and 60-ride monthly individual tickets for use in intrastate commutation passenger travel over lines of the Chicago and North Western Railway Company in the State of Illinois, said tariffs having been filed on or about February 6, 1942 with each the Illinois Commerce Commission and the Interstate Commerce Commission, and amendments to said tariffs likewise filed on or about March 6, 1942 which withdrew from said first named tariffs certain rates, fares and charges named therein other than those respecting the four classes of tickets above described, or on account of any alleged violation of a certain order issued by the Illinois Commerce Commission under date of February 18, 1942, purporting to suspend the rates, fares, and charges set forth in said tariffs as to the four classes of tickets above described, and from arresting plaintiff or any of his agents or attempting to secure the conviction or imprisonment of plaintiff or any of his agents on account [fols. 51-52] of any of the foregoing acts; and from pre-

venting or hindering plaintiff and his agents from charging and collecting the increased rates, fares and charges so established by said tariffs as amended, effective March 8, 1942; and from molesting or interfering with plaintiff and his agents in any respect whatsoever as to their collection of the said increased rates, fares and charges.

It is further ordered, that plaintiff as a condition of issuance of this order, shall give security by surety bond in the amount of ten thousand dollars, to be approved by the court, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.

It is further ordered, that a copy of this order be duly served upon each of the defendants not later than the 14th day of March, 1942.

Enter:

Holly, District Judge.

Entered: March 11th, 1942, at 9.37 M.

[fols. 53-55] Bond on Temporary restraining order for $10,000 approved and filed March 11, 1942, omitted in printing.

[fol. 56] IN DISTRICT COURT OF THE UNITED STATES, NORTHERN DISTRICT OF ILLINOIS

[Title omitted]

MOTION OF THE DEFENDANTS TO STRIKE THE PLAINTIFF'S COMPLAINT AND TO DISMISS THE CAUSE—Filed March 20, 1942

Now come the defendants, Illinois Commerce Commission, and John D. Biggs, William Parrillo, Frank Peska, Edwin A. Rosenstone and Val J. Washington, individually and as members of and constituting the Illinois Commerce Commission; Dwight H. Green, individually and as Governor of the State of Illinois; George F. Barrett, individually and as Attorney General of the State of Illinois; Thomas J. Courtney, individually and as State's Attorney of Cook County, Illinois; Harry A. Hall, individually and as State's Attorney of Lake County, Illinois; Lee E. Daniels, indi-

[fol. 57] vidually and as State's Attorney of DuPage County, Illinois; Charles G. Seidel, individually and as State's Attorney of Kane County, Illinois, and William M. Carroll, individually and as State's Attorney of McHenry County, Illinois, by George F. Barrett, Attorney General of the State of Illinois, their attorney, and for this their motion to strike the plaintiff's complaint and to dismiss the plaintiff's cause say and show unto the court that the said complaint is infirm, informal, insubstantial and insufficient in law and in equity; and as and for the particular grounds of the said motion the defendants say and show unto this court:

I

That this court is without jurisdiction of the subject matter of this cause because the complaint does not fairly make, state or plead any case against the validity of any state statute or the interpretation of any state statute by any officer or agent of the State of Illinois under the Constitution of the United States of America.

II

The plaintiff's cause constitutes an attempt to enjoin the execution of the Public Utilities Act of Illinois by officers and agents of the State of Illinois upon the ground that such execution of such statute would invade the rights of the plaintiff under the Constitution of the United States, without showing that interstate commerce is fairly involved and without showing that there is not a plain, adequate and speedy remedy at law or in equity in the courts of the State of Illinois.

III

The complaint does not make, state or plead any case, cause of action or ground of relief, either at law or in equity.

[fols. 58-59] IV

It appears upon the face of the complaint that the order of the Interstate Commerce Commission entered January 21, 1942, upon which order the plaintiff's cause is founded, is null, void and invalid for want of sufficient recitals and findings of fact.

V

It appears upon the face of the said complaint that the order last aforesaid of the Interstate Commerce —, whether valid or invalid, does not by its terms purport to establish or institute any schedule of increased rates applicable to the plaintiff; but that on the contrary the tenor of the order is merely to withdraw federal prohibition against such increased schedule of rates and to suffer the plaintiff to procure appropriate authority, if he can procure such authority, from the Illinois Commerce Commission.

VI

That the complaint is otherwise and in other matters, respects and particulars infirm, informal, insubstantial and insufficient in law and in equity.

Wherefore, the defendants pray that the plaintiff's complaint be stricken and that the above entitled cause be dismissed at the cost of the plaintiff, and the defendants further pray that the temporary restraining order heretofore entered be dissolved.

Illinois Commerce Commission, and John D. Biggs, William Parrillo, Frank Peska, Edwin A. Rosenstone, and Val J. Washington, individually and as members of and constituting the Illinois Commerce Commission; Dwight H. Green, individually and as Governor of the State of Illnois; George F. Barrett, individually and as Attorney General of the State of Illinois; Thomas J. Courtney, individually and as State's Attorney of Cook County, Illinois; Harry A. Hall, individually and as State's Attorney of Lake County, Illinois; Lee E. Daniels, individually and as State's Attorney of DuPage County, Illinois; Charles G. Seidel, individually and as State's Attorney of Kane County, Illinois, and William M. Carroll, individually and as State's Attorney of McHenry County, Illinois.

George F. Barrett, Attorney General of the State of Illinois, Attorney for defendants.

[fol. 60] IN DISTRICT COURT OF THE UNITED STATES, NORTHERN DISTRICT OF ILLINOIS

[Title omitted]

NOTICE—Filed March 20, 1942

To: W. T. Faricy, Esq., Nye F. Morehouse, Esq., T. F. Gault, Esq., Attorneys for Plaintiff, 400 West Madison Street, Chicago, Illinois.

Please take notice that we shall file with the Clerk of the United States District Court on March 20, 1942 a motion to strike the plaintiff's complaint in the above entitled cause and to dismiss the said cause, a copy of which motion is served upon you herewith.

George F. Barrett, Attorney General of the State of Illinois, Attorney for Defendants.

[fols. 61-62] STATE OF ILLINOIS,
County of Cook, ss:

William C. Wines, being first duly sworn upon his oath, deposes and says, that he has served a copy of the above and foregoing motion upon the plaintiff by depositing in the United States Mail a copy thereof, together with a copy of the notice of his intention to file the same, in an envelope bearing three cents (3¢) United States Postage and addressed to counsel for the plaintiff as follows:

W. T. Faricy, Esq., Nye F. Morehouse, Esq., T. F. Gault, Esq., Attorneys for Plaintiff, 400 West Madison Street, Chicago, Illinois.

William C. Wines.

Subscribed and sworn to before me this 19th day of March, A. D. 1942. Mary Neff, Notary Public. (Seal.)

[fol. 63] IN DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS

[Title omitted]

Findings of Fact and Conclusions of Law—March 21, 1942

This cause having come on for hearing before this Court the 20th day of March, 1942, upon plaintiff's motion for

interlocutory injunction and defendants' motion to strike the complaint and dismiss the cause; and

The Court having heard and considered the matter upon the sworn complaint, affidavits, and exhibits and having heard counsel and being fully advised in the premises, makes the following findings of fact and conclusions of law:

Findings of Fact

1. The Court has jurisdiction of this cause under Sections 24(8), 24(1), and 266 of the Judicial Code.

2. All parties defendant have been duly served with copies of the complaint, temporary restraining order, bond, and plaintiff's motion for interlocutory injunction, and were represented by counsel at the hearing hereof.

3. By its order of January 21, 1942, in Ex Parte No. 148 the Interstate Commerce Commission, after hearing, entered an order, a copy of which is attached to the complaint herein [fol. 64] as Exhibit B, which plaintiff contends in good faith is valid on its face and that it by its terms authorizes (among other things) the plaintiff to increase by ten per cent the plaintiff's then existing intrastate passenger fares applicable to four certain classes of tickets for use in intrastate commerce in the so-called Chicago Suburban Area in the State of Illinois, described in the complaint.

4. On or about February 6, 1942, the plaintiff proceeded to file with the Interstate Commerce Commission and the Illinois Commerce Commission tariffs, the effect of which was to increase the said previously existing Illinois intrastate commutation passenger fares by ten per cent, effective March 8, 1942.

5. On or about February 18, 1942, the defendant Illinois Commerce Commission issued a suspension order (Exhibit C attached to the complaint herein), by the terms of which it undertook to suspend to July 6, 1942 the said tariffs and increased fares named therein and ordered the plaintiff not to file any subsequent tariff or otherwise to change said previously existing fares during such period of suspension or any extension thereof unless specially authorized by said Illinois Commerce Commission.

6. The said tariffs so filed by the plaintiff by their terms became effective March 8, 1942, and plaintiff in good faith

contends that the increased fares therein named upon and since that date up to the present time are the lawful existing fares under and by virtue of said order of the Interstate Commerce Commission in Ex Parte No. 148, and plaintiff likewise contends he is entitled and required to collect and continue collecting same.

7. After the entry of said suspension order, defendants took and have since maintained the position that said order in Ex Parte No. 148 was void and of no force or effect [fol. 65] to authorize the establishment and collection of said increased fares, and that the said suspension order of the Illinois Commerce Commission is a valid and enforcible order and plaintiff, by collecting and continuing to collect said increased fares, is subject to the imposition of the heavy fines and penalties provided in the Illinois Statutes for violations by public utilities of the provisions of the Illinois Public Utilities Act and orders of the Illinois Commerce Commission and the Illinois Two-Cent Fare Law.

8. In support of the position thus taken by defendants, they have threatened and continue to threaten the plaintiff with the commencement and prosecution of numerous actions in the State courts of Illinois for the imposition upon him and his agents of the said fines and penalties if he or they continue to collect the aforesaid increased fares.

9. Unless this Court grants at this time an interlocutory injunction as prayed for in the complaint herein, the plaintiff and his agents will be subject to imminent liability for prosecution and possible arrest because of the threatened day-to-day accumulation of heavy penalties under the aforesaid State Statutes, and will be liable to be interfered with in the collection of said fares by virtue of the said threatened action of the defendants, and plaintiff will thereby be subjected to immediate and irreparable loss of passenger revenues which he in good faith contends are rightfully due him and otherwise be subject to immediate and irreparable loss, damage and injury.

Conclusions of Law

1. Upon the allegations of the sworn complaint and the affidavits and exhibits submitted on behalf of plaintiff in support of his motion and upon the foregoing findings plain- [fols. 66-67] tiff is entitled to an interlocutory injunction as

prayed for in the complaint and motion, to now issue and remain in effect until final determination of this cause.

2. Said interlocutory injunction should issue and become effective upon the giving of a bond by plaintiff in the amount of Ten Thousand Dollars ($10.000.00) indemnifying the People of the State of Illinois for the use of and in trust for any and all persons who may sustain loss by reason of said interlocutory injunction, said bond to be approved by the Court.

3. Ruling on defendants' motion should be reserved until final determination of this cause.

Enter:

Sherman Minton, Circuit Judge; William H. Holly, District Judge; Philip L. Sullivan, District Judge.

Entered: March 21, A. D. 1942, at 11 o'clock, A. M.

[fol. 68] In District Court of the United States for the Northern District of Illinois

[Title omitted]

Order Granting Interlocutory Injunction—March 21, 1942

This cause coming on for hearing before this Court, the 20th day of March, A. D. 1942, pursuant to plaintiff's motion for interlocutory injunction and notice thereon, and pursuant to the defendants' motion to strike the complaint and dismiss the cause,

And the court having received for consideration the sworn complaint herein and the affidavit and exhibits offered on behalf of the plaintiff in support of its motion for interlocutory injunction.

And the court further having received the motion of the defendants to strike the complaint and dismiss the cause for consideration, and having heard arguments of counsel, of both the plaintiff and the defendants, and both the plaintiff and the defendants having submitted written briefs on their respective motions herein, and the Court having made its findings of fact and conclusions of law,

[fol. 69] It is therefore ordered that ruling on the defendants' motion is hereby reserved, and the motion of the

plaintiff for interlocutory injunction is hereby granted on the terms expressed.

It is further ordered that, copies of all exhibits and documentary evidence offered by the plaintiff in support of its motion having been submitted to the counsel for the defendants for examination, leave hereby is given to the said defendants' counsel to reserve the right of the defendants to interpose objections thereto, if they so desire, upon the final hearing, upon the plaintiff's motion.

It is further ordered that upon the showing contained within the sworn complaint and affidavits and exhibits hereto submitted on behalf of plaintiff, an interlocutory injunction shall issue pending a determination of this cause restraining and enjoining the defendants, and each of them, their servants, agents, employes, attorneys, and all persons in active concert or participation with the defendants or any of them, from commencing any action, or actions, or instituting any legal proceedings for the collection of any fines or penalties against the plaintiff, or his agents, on account of the filing by them of tariffs effective March 8, 1942, with the Interstate Commerce Commission, providing for the collection of increased rates, fares and charges for 10-ride bearer, 25-ride bearer, 25-ride individual and 60-ride monthly individual tickets, for use in intrastate com- [fols. 70-71] mutation travel over the lines of the Chicago and North Western Railway Company in the State of Illinois, or on account of any alleged violation of a certain order issued by the Illinois Commerce Commission under date of February 18, 1942, purporting to suspend rates, fares and charges set forth in said tariffs as to the aforesaid four classes of tickets described; and from arresting the plaintiff, or any of its agents, or attempting to secure conviction, or imprisonment of plaintiff, or any of its agents, on account of any of the foregoing acts, and from molesting or interfering with the plaintiff, or his agents, in any respect whatsoever as to their collections of the said increased rates, fares and charges until a further order of this Court.

It is further ordered that the issuance of the said writ of injunction shall be conditional upon the filing by the plaintiff of its bond in the sum of Ten Thousand Dollars ($10,000.00) indemnifying the People of the State of Illinois for the use of and in trust for any and all persons who may

sustain loss by reason of said interlocutory injunction, said bond to be approved by the Court.

Enter:

Sherman Minton, Circuit Judge; William H. Holly, District Judge; Philip L. Sullivan, District Judge.

Dated: March 21, A. D. 1942, at 11 o'clock A. M.

[fol. 72] In District Court of the United States, Northern District of Illinois

[Title omitted]

Interlocutory Injunction—March 21, 1942

The application of plaintiff for an interlocutory injunction in this cause having come on for hearing upon plaintiff's motion and the verified complaint hereon the 20th day of March, 1942, before the Honorable Sherman Minton, Circuit Judge and Honorable William H. Holly and Philip L. Sullivan, District Judges, and it appearing to the court that five days' notice of said hearing has been duly given to the Governor and the Attorney General of the State of Illinois, and to all the defendants in said cause, as provided by law; and the court having heard the matters presented and arguments of counsel for both plaintiff and defendants, and being fully advised in the premises;

It is therefore ordered, that the defendants Illinois Commerce Commission, and John D. Biggs, William Parrillo, Frank Feska, Edwin A. Rosenstone, and Val J. Washington, individually and as members of and constituting the Illinois Commerce Commission: Dwight H. Green, individually and as Governor of the State of Illinois; George F. Barrett, individually and as Attorney General of the State of Illinois; Thomas J. Courtney, individually and as State's [fol. 73] Attorney of Cook County, Illinois; Harry A. Hall, individually and as State's Attorney of Lake County, Illinois, Lee E. Daniels, individually and as State's Attorney of Du Page County, Illinois; Charles G. Seidel, individually and as State's Attorney of Kane County, Illinois, and William M. Carroll, individually and as State's Attorney of McHenry County, Illinois, and each of them, their servants, agents, employes, attorneys and all persons in active con-

cert or participation with the defendants or any of them be, and they hereby are, restrained and enjoined from commencing any action or actions or instituting any legal proceeding for the collection of any fines or penalties against the plaintiff or his agents on account of the filing by them of tariffs (effective March 8, 1942) with the Interstate Commerce Commission providing for the collection of increased rates, fares and charges for 10-ride bearer, 25-ride bearer, 25-ride individual, and 60-ride monthly individual tickets for use in intrastate commutation passenger travel over lines of the Chicago and North Western Railway Company in the State of Illinois, said tariffs having been filed on or about February 6, 1942 with each the Illinois Commerce Commission and the Interstate Commerce Commission, and amendments to said tariffs likewise filed on or about March 6, 1942 which withdrew from said first named tariffs certain rates, fares and charges named therein other than those respecting the four classes of tickets above described; or on account of any alleged violation of a certain order issued by the Illinois Commerce Commission under date of February 18, 1942 purporting to suspend the rates, fares and charges set forth in said tariffs as to the four [fols. 74-75] classes of tickets described; and from arresting plaintiff or any of his agents or attempting to secure the conviction or imprisonment of plaintiff or any of his agents on account of any of the foregoing acts; and from preventing or hindering plaintiff and his agents from charging and collecting the increased rates, fares and charges so established by said tariffs as amended, effective March 8, 1942; and from molesting or interfering with plaintiff or his agents in any respect whatsoever as to their collection of the said increased rates, fares and charges; until the final hearing of this cause or the further order of this court.

Dated March 21st, 1942.

By the Court.

Sherman Minton, Circuit Judge; William H. Holly, Philip L. Sullivan, District Judges.

Entered: March 21, 1942, at 11 o'clock A. M.

[fols. 76-78] Bond on interlocutory injunction for $10,000 approved and filed March 21, 1942, omitted in printing.

[fol. 79] IN DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS

[Title omitted]

Findings of Fact and Conclusions of Law—April 28, 1942

This cause having come on for final hearing before this Court the 17th day of April, 1942, upon defendants' motion to strike the complaint and dismiss the cause and upon the prayer of the complaint for a perpetual injunction; and

The defendants having filed no answer and having elected to stand upon their motion; and

The Court having heard and considered the cause upon the sworn complaint and the supporting evidence heretofore received at the hearing upon plaintiff's motion for interlocutory injunction and upon the briefs and arguments of counsel and certain reports and orders of the Interstate Commerce Commission submitted therewith, of which this Court takes judicial notice, and being fully advised in the premises, makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. The Court has jurisdiction of this cause under Sections 24(8), 24(1), and 266 of the Judicial Code.

2. All parties defendant have been duly served with copies of the complaint, temporary restraining order, bond, and plaintiff's motion for interlocutory injunction, and were represented by counsel at the preliminary hearing [fol. 80] herein on March 20, 1942, and at this final hearing.

3. Up to and including March 7, 1942, plaintiff and his predecessor in interest, the Chicago and North Western Railway Company, had been collecting fares for the transportation of intrastate passengers in commutation service in Illinois rates, fares and charges pursuant to requirements of a supplemental report and order of the Interstate Commerce Commission entered upon appropriate findings of value, preference and prejudice and unjust discrimination against interstate commerce under date of October 6, 1925, in a proceeding entitled "In the Matter of Intrastate Fares Within the State of Illinois," Docket No. 11703, 102 I. C. C. 479, a copy of which is attached to the com-

plaint herein as Exhibit A. On October 23, 1925, an interlocutory injunction was entered in the District Court of the United States for the Northern District of Illinois, Eastern Division, by a specially constituted court of three judges, wherein the persons who were then members of the Illinois Commerce Commission, the Governor, Attorney General, and other State officials were enjoined from in any way interfering with the collection of the fares and charges authorized by said order and required by said order and set forth in tariff schedules on file with the Interstate Commerce Commission.

4. The said supplemental report and order, Exhibit A, were issued by the Interstate Commerce Commission following and in connection with a nationwide investigation of freight and passenger rates and charges in effect throughout the United States, following the close of the First World War. The purpose and effect of said order of October 6, 1925 was to require the Chicago and North Western Railway Company to increase its passenger fares with respect to intrastate commutation travel within the State of Illinois to substantially the same level as then existed with respect to interstate passenger traffic, which had previously been increased by it pursuant to order and authority of the [fol. 81] Interstate Commerce Commission, and thus to remove undue preference and prejudice, and unjust discrimination against interstate commerce, as well as undue preference and advantage to persons traveling in intrastate commerce on its railroad lines within the State of Illinois, as more particularly set forth in Exhibit A.

The said order of the Interstate Commerce Commission was of a continuing nature and expressly provided that it should remain in force until further order of that Commission.

5. On February 28, 1936, in a proceeding known as Docket No. 26550, Passenger Fares and Surcharges (214 I. C. C. 174), the Interstate Commerce Commission, in a further general and nation-wide investigation of railroad passenger fares, entered an order which, by specific reference to its above-mentioned previous order in Docket No. 11703, retained its continuing jurisdiction over the Illinois intrastate commutation passenger fares here involved, although the effect thereof was not to require any modification of said fares.

6. In December, 1941, pursuant to a petition filed on behalf of virtually all of the Railroads in the United States, the Interstate Commerce Commission undertook a further nationwide general investigation of both freight rates and passenger fares to determine whether or not increases of ten per cent therein should be authorized, as requested by the railroads, in order to assist them in meeting increased operating expenses then being incurred on account of (a) increased wages to employes, (b) increased cost of materials and supplies, and (c) additional expenditures to safeguard their properties and operations during the war emergency. By its order entered under date of January 21, 1942, in said proceeding, known as Ex Parte No. 148, Increased Railway Rates, Fares, and Charges, 1942, which is a valid and lawful order, the Interstate Commerce Commission authorized the railroads, including the plaintiff [fol. 82] herein, to increase their passenger rates, fares, and charges ten per cent, as appears in Exhibit B, made a part of the complaint, upon findings that said increase is necessary to enable the railroads to continue to render adequate and efficient railway transportation service during the present emergency, and that said increased fares are reasonable and lawful.

7. In its report in Ex Parte No. 148 entered under date of March 2, 1942, the Commission renewed and affirmed the aforesaid findings, and found in addition that wage increases and other increased costs had imposed upon the carriers increased operating expenses upward of $360,000,000 annually; that increased passenger fares and freight rates were requested to enable the carriers to meet these increased expenses and insure their ability to render adquate transportation service during the current war emergency; that these increased expenses were general in character and applied to all classes of traffic; that the only practical method of providing the necessary increased revenues was to grant authority for a general increase in all rates and fares; that the passenger traffic justly and reasonably should bear a part of the proposed increase; that a ten per cent increase in passenger fares would produce upwards of $45,000,000 of additional revenue which, in connection with the increased freight rates allowed, would be just and reasonable. The order of January 21, 1942, further provided that all outstanding orders, as amended, of the Commission, authorizing or prescribing

interstate and intrastate fares, or bases of fares, were thereby modified, effective concurrently with the establishment of the increased fares therein approved, only to the extent necessary to permit the increase therein authorized to be added to the interstate and intrastate fares approved or prescribed in, or maintained or held by virtue of, said outstanding orders; and further, that all tariffs or supplements changing fares by authority of said order, which are [fol. 83] maintained or held by authority of outstanding orders of the Commission, should bear on their title pages specific reference to that order. By reference to outstanding orders previously issued in proceedings under Section 13 of the Interstate Commerce Act and reference to the outstanding order in said Docket No. 11703, this order was made applicable, specifically, to the Illinois intrastate commutation passenger fares involved in this suit.

8. On or about February 6, 1942, plaintiff proceeded to file with the Interstate Commerce Commission and the Illinois Commerce Commission tariff schedules giving reference to the aforesaid order of the Interstate Commerce Commission entered on January 21, 1942, the effect of which was to modify the said previously existing Illinois intrastate commutation and passenger fares by increasing them ten per cent effective March 8, 1942.

9. On or about February 18, 1942, the defendant Illinois Commerce Commission issued a so-called suspension order (Exhibit C attached to the complaint herein), by the terms of which it undertook to suspend to July 6, 1942 the said tariffs and increased fares named therein, and ordered the plaintiff not to file any subsequent tariff or otherwise to change said previously existing fares during such period of suspension or any extension thereof unless specially authorized by said Illinois Commerce Commission.

10. The said tariffs so filed by the plaintiff became effective March 8, 1942 and the increased fares therein named upon and since that date up to the present time are the lawful existing fares, and plaintiff is entitled and required to collect and continue collecting same.

11. The purport and effect of said Illinois Commerce Commission order of February 18, 1942 is to prescribe for plaintiff intrastate passenger fares upon the four classes of tickets above mentioned, as such fares existed on Feb-

ruary 18, 1942, and to prohibit plaintiff from increasing or modifying same unless and until permitted to do so by [fol. 84] further order of that Commission at some indefinite time in the future.

12. The said fares so purported to be fixed and prescribed by the Illinois Commerce Commission are noncompensatory in that they do not produce sufficient revenue for the plaintiff to meet the expenses of rendering the service of transporting intrastate passengers upon said tickets within the Chicago suburban area in the State of Illinois. The business of transporting such passengers within said area is now being conducted, and for some years has been conducted, by the plaintiff at a loss and without deriving any return whatsoever upon the value of the property of the plaintiff devoted to the rendering of such service.

13. The increased rates above mentioned will not be sufficient to overcome the loss being realized by plaintiff from the transportation of intrastate passengers upon the four classes of commutation tickets above mentioned within said area in Illinois, and with the application and collection of said increased fares plaintiff is still realizing a loss therefrom and is deriving no return whatsoever upon the investment in the property used in and devoted to the rendering of such transportation service. Some of said increased fares are at rates in excess of two cents per mile and hence within the prohibition of the Illinois two-cent fare law.

14. After the entry of said suspension order, defendants took and have since maintained the position that said order in Ex Parte No. 148 was void and of no force or effect to authorize the establishment and collection of said increased fares, and that the said suspension order of the Illinois Commerce Commission is a valid and enforceable order and plaintiff, by collecting and continuing to collect said increased fares, is subject to the imposition of the heavy fines and penalties provided in the Illinois Statutes for violations by public utilities of the provisions of the Illinois Public Utilities Act and orders of the Illinois Commerce Commission and the Illinois Two-Cent Fare law.

[fol. 85] 15. In support of the position thus taken by defendants, they have threatened and continue to threaten the plaintiff with the commencement and prosecution of

numerous actions in the State courts of Illinois for the imposition upon him and his agents of the said fines and penalties if he or they continue to collect the aforesaid increased fares.

16. Unless this Court grants at this time perpetual injunction as prayed for in the complaint herein, the plaintiff and his agents will be subject to imminent liability for prosecution and possible arrest because of the threatened day-to-day accumulation of heavy penalties under the aforesaid State Statutes, and will be liable to be interfered with in the collection of said lawful fares by virtue of the said threatened action of the defendants, and plaintiff will thereby be subjected to immediate and irreparable loss of passenger revenues rightfully due him, thereby being deprived of his property without due process of law.

Conclusions of Law

1. The said order of the Interstate Commerce Commission of January 21, 1942 is a valid order and it authorizes the ten per cent increase in fares as set forth in the aforesaid tariffs filed by the plaintiff and effective March 8, 1942.

2. The said order of January 21, 1942 expressly modified the previous order of the Interstate Commerce Commission entered in 1925 (Exhibit A attached to the complaint herein), by which the Interstate Commerce Commission had taken jurisdiction over the passenger fares involved in this suit, which jurisdiction it had thereafter retained. By virtue of its orders referred to in the foregoing findings, the Interstate Commerce Commission asserted and exercised its paramount and exclusive authority in the regulation of the passenger fares here involved, leaving the Illi- [fols. 86-87] nois Commerce Commission without power to act with respect thereto.

3. The passenger fares established by the said tariffs which became effective March 8, 1942, are the lawful existing passenger fares which plaintiff is entitled to collect and retain.

4. The Illinois Commerce Commission's order of February 18, 1942 (Exhibit C attached to the complaint herein) is void and of no force or effect whatever with respect to the fares and charges for the four classes of tickets above mentioned.

5. The rates which said Illinois Commerce Commission order would require plaintiff to observe and collect with respect to the four classes of commutation tickets for intrastate passenger travel, involved in this suit, would be noncompensatory and confiscatory. Enforcement of said order would deprive plaintiff of his property without due process of law, in violation of Amendment XIV of the Constitution of the United States.

6. Defendants' motion to strike and to dismiss should be denied.

7. Plaintiff is entitled to a perpetual injunction as prayed for in the complaint herein and a decree of injunction will issue accordingly at this time.

Sherman Minton, Circuit Judge. William H. Holly, District Judge. Philip L. Sullivan, District Judge.

April 28, 1942.

[fol. 88] IN DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS

[Title omitted]

ORDER DENYING DEFENDANTS' MOTION TO DISMISS AND GRANTING PERMANENT INJUNCTION—April 28, 1942

This cause having come on for final hearing before this Court this 17th day of April, 1942, upon defendants' motion to strike the complaint and dismiss the cause and upon the prayer of the complaint for a permanent injunction; and

The Court having heard and considered the arguments of counsel and being fully advised in the premises, and having made and entered herein its findings of fact and conclusions of law;

It is therefore ordered, that the defendants' motion to strike the complaint and dismiss the cause be and it is hereby denied; and

For the reasons that the order of the Interstate Commerce Commission of January 21, 1942, referred to in said findings, has authorized plaintiff to establish and collect the increased passenger fares involved in this suit, and

the order of the Illinois Commerce Commission which would prevent him from establishing and collecting same is void and the fares which he would be required to collect pursuant to said last-mentioned order would be confiscatory of his property, all as more particularly set forth in the [fol. 89] findings and conclusions this day entered herein by the Court;

It is further ordered, that the defendants Illinois Commerce Commission, and John D. Biggs, William Parrillo, Frank Peska, Edwin A. Rosenstone, and Val J. Washington, individually and as members of and constituting the Illinois Commerce Commission; Dwight H. Green, individually and as Governor of the State of Illinois; George F. Barrett, individually and as Attorney General of the State of Illinois; Thomas J. Courtney, individually and as State's Attorney of Cook County, Illinois; Harry A. Hall, individually and as State's Attorney of Lake County, Illinois; Lee E. Danie-s, individually and as State's Attorney of DuPage County, Illinois; Charles G. Seidel, individually and as State's Attorney of Kane County, Illinois; and William H. Carroll, individually and as State's Attorney of McHenry County, Illinois, and each of them, their servants, agents, employees, attorneys and all persons in active concert or participation with the defendants or any of them be, and they hereby are, restrained and enjoined, perpetually from commencing any action or actions or instituting any legal proceeding for the collection of any fines or penalties against the plaintiff or his agents on account of the filing by them of tariffs (effective March 6, 1942) with the Interstate Commerce Commission providing for the collection of increased rates, fares and charges for 10-ride bearer, 25-ride bearer, 25-ride individual, and 60-ride monthly individual tickets for use in intrastate commutation passenger travel over lines of the Chicago and North Western Railway Company in the State of Illinois, said tariffs having been filed on or about February 6, 1942 with each the Illinois Commerce Commission and the Interstate Commerce Commission, and amendments to said tariffs likewise filed on or about March 6, 1942 which withdrew [fols. 90-91] from said first-named tariffs certain rates, fares and charges named therein other than those respecting the four classes of tickets above described; or on account of any alleged violation of a certain order issued by

the Illinois Commerce Commission under date of February 18, 1942 purporting to suspend the rates, fares and charges set forth in said tariffs as to the four classes of tickets described; and from arresting plaintiff or any of his agents or attempting to secure the conviction or imprisonment of plaintiff or any of his agents on account of any of the foregoing acts; and from preventing or hindering plaintiff and his agents from charging and collecting the increased rates, fares and charges so established by said tariffs as amended, effective March 8, 1942; and from molesting or interfering with plaintiff or his agents in any respect whatsoever as to their collection of the said increased rates, fares and charges.

Dated April 28, 1942.

By the Court.

Sherman Minton, Circuit Judge; William H. Holly, District Judge; Philip L. Sullivan, District Judge.

[fol. 92] In District Court of the United States, Northern District of Illinois

[Title omitted]

Petition for Appeal—Filed May 25, 1942

The defendants, Illinois Commerce Commission, and John D. Biggs, William Parrillo, Frank Peska, Edwin A. Rosenstone, and Val J. Washington, individually and as members of and constituting the Illinois Commerce Commission; Dwight H. Green, individually and as Governor of the State of Illinois; George F. Barrett, individually and as Attorney General of the State of Illinois; Thomas J. Courtney, individually and as State's Attorney of Cook County, Illinois; Harry A. Hall, individually and as State's Attorney of Lake County, Illinois; Lee E. Daniels, individually and as State's Attorney of DuPage County, Illinois; Charles G. Seidel, individually and as State's Attorney of Kane County, Illinois, and William M. Carroll, individually and as State's Attorney of McHenry County, [fols. 93-94] Illinois, by George F. Barrett, Attorney General of the State of Illinois, their attorney, feeling themselves aggrieved by the final order, decree or adjudication

heretofore rendered and pronounced against them in the above entitled cause on or about the 28th day of April, A. D. 1942, hereby jointly and severally petition and pray an appeal from the said final order, decree or adjudication to the Supreme Court of the United States, under and in conformity with the provisions of Section 266 of the United States Judicial Code (28 U. S. C. A. 380), to the end that the said order and adjudication may be reversed, or, in the alternative, that the same may be reversed and remanded to this court with appropriate directions touching and concerning the said cause and the disposition thereof.

The defendants pray that their said appeal be allowed; that a citation be issued as provided by law; that their appeal bond be fixed at the sum of Five Hundred Dollars ($500.00) and that their appeal bond in that sum, proffered herewith, be approved and ordered filed; and that a transcript of the records, proceedings and documents upon which the said order and adjudication was based, duly authenticated and certified, be transmitted to the Supreme Court of the United States under the rules of the Supreme Court in such case made and provided.

Illinois Commerce Commission; and John D. Biggs, William Parrillo, Frank Peska, Edwin A. Rosenstone, and Val J. Washington, individually and as members of and constituting the Illinois Commerce Commission; Dwight H. Green, individually and as Governor of the State of Illinois; George F. Barrett, individually and as Attorney General of the State of Illinois; Thomas J. Courtney, individually and as State's Attorney of Cook County, Illinois; Harry A. Hall, indiyidually and as State's Attorney of Lake County, Illinois; Lee E. Daniels, individually and as State's Attorney of DuPage County, Illinois; Charles G. Seidel, individually and as State's Attorney of Kane County, Illinois, and William M. Carroll, individually and as State's Attorney of McHenry County, Illinois, Defendants-Appellants. By George F. Barrett, Attorney General of the State of Illinois, Attorney for Defendants-Appellants.

[fol. 95] IN DISTRICT COURT OF THE UNITED STATES, NORTHERN DISTRICT OF ILLINOIS

[Title omitted]

ORDER ALLOWING APPEAL AND APPROVING BOND—May 25, 1942

This day came the defendants, Illinois Commerce Commission and John D. Biggs, William Parrillo, Frank Peska, Edwin A. Rosenstone, and Val J. Washington, individually and as members of and constituting the Illinois Commerce Commission; Dwight H. Green, individually and as Governor of the State of Illinois; George F. Barrett, individually and as Attorney General of the State of Illinois; Thomas J. Courtney, individually and as State's Attorney of Cook County, Illinois; Harry A. Hall, individually and as State's Attorney of Lake County, Illinois; Lee E. Daniels, individually and as State's Attorney of DuPage County, Illinois; Charles G. Seidel, individually and as State's Attorney of [fols. 96-97] Kane County, Illinois, and William A. Carroll, individually and as State's Attorney of McHenry County, Illinois, by George F. Barrett, Attorney General of the State of Illinois, their attorney, and presented to this court their petition for appeal to the Supreme Court of the United States from the final judgment order or decree rendered, pronounced and spread of record in this Court on the 28th day of April, A. D. 1942, and the said petition having been duly filed together with the defendants' assignment of errors and the defendants' statement of jurisdiction on appeal, all pursuant to the statute, federal rules of civil procedure and the rules of the Supreme Court of the United States in such case made and provided;

It is thereupon ordered that the said appeal to the Supreme Court of the United States be and the same is hereby allowed in this cause as provided by law, that a citation be and the same is herewith issued as provided by law, and that the Clerk of this Court be and he is hereby ordered to prepare and certify a record of the proceedings in the above entitled cause, and transmit the same to the Clerk of the Supreme Court of the United States within forty (40) days from today, as under the rules of the Supreme Court in such cases is made and provided.

It is further ordered that the appeal bond on this appeal be and the same is hereby fixed at the sum of Five Hundred Dollars ($500.00), conditioned upon the said appellants'

prosecuting their said appeal to effect, or paying all costs incurred therein.

The said defendants-appellants now presenting an appeal bond in the said penal sum of Five Hundred Dollars ($500.00) so conditioned, with Standard Accident Insurance Company as surety thereon,

It is further ordered that the said appeal bond be and the same is hereby approved and ordered filed herein.

Enter:

Holly, a Judge of the District Court of the United States for the Northern District of Illinois.

[fol. 98] IN DISTRICT COURT OF THE UNITED STATES, NORTHERN DISTRICT OF ILLINOIS

[Title omitted]

ASSIGNMENTS OF ERROR—Filed May 25, 1942

The defendants, Illinois Commerce Commission, and John D. Biggs, William Parrillo, Frank Peska, Edwin A. Rosenstone, and Val J. Washington, individually and as members of and constituting the Illinois Commerce Commission; Dwight H. Green, individually and as Governor of the State of Illinois; George F. Barrett, individually and as Attorney General of the State of Illinois; Thomas J. Courtney, individually and as State's Attorney of Cook County, Illinois; Harry A. Hall, individually and as State's Attorney of Lake County, Illinois; Lee E. Daniels, individually and as State's Attorney of Du Page County, Illinois; Charles G. Seidel, individually and as State's Attorney of Kane [fol. 99] County, Illinois; and William M. Carroll, individually and as State's Attorney of McHenry County, Illinois, by George F. Barrett, Attorney General of the State of Illinois, their attorney, make and present these assignments of error upon the record in the above entitled cause and say that in the record and proceedings in the above entitled cause and in the final order, judgment or decree rendered and pronounced on the 28th day of April, A. D. 1942, by the District Court of the United States specially constituted under the provisions of Section 266 of the Judicial Code (28 U. S. C. A. 380), manifest error intervened in the matters, respects and particulars hereinafter set forth, that is to say:

I

The court erred in rendering and pronouncing the said order, and adjudication.

II

The court erred in denying and in not sustaining the defendants' motion to strike the plaintiff's complaint and to dismiss the cause for want of equity and upon the merits, and in not striking the plaintiff's complaint and in not dismissing the cause for want of equity and upon the merits.

III

The court erred in not holding as a matter of law that the supposed and purported order of the Interstate Commerce Commission dated January 21, 1942, mentioned, set forth and relied upon in the plaintiff's complaint was null, void and of no force, effect or virtue, because the said order was not supported either by the recitals in the text thereof or otherwise, by adequate and sufficient findings of the facts upon which the said order was based.

IV

The court erred in failing to hold that the said supposed and purported order, even if valid according to its terms [fol. 100] and purport, merely permitted the plaintiff to increase the rates, schedules and tariffs mentioned in the said order in so far as there might have existed prior to the entry of the said order any federal prohibition of or any obstacle to such increase in rates, but that the said order intended and contemplated that the plaintiff was nevertheless not exempted by the said order from the necessity of obtaining the sanction, authority or permission of the Illinois Commerce Commission before so increasing such rates, schedules and tariffs.

V

The court erred in so restraining, enjoining and commanding the defendants as in and by the said final order and adjudication they are commanded, restrained and enjoined.

VI

The court erred in not holding that the defendants in the official capacities as aforesaid have been and are en-

titled to commence and prosecute such action or actions or other legal proceeding against the plaintiff for and on account of any increase in the rates, schedules and tariffs as contemplated by the said order of the Interstate Commerce Commission of January 21, 1942, without the permission, consent or authorization of the Illinois Commerce Commission.

VII

That the final order and adjudication aforesaid and the other proceedings had, taken and appearing of record in the above entitled cause are in other wise and other matters, respects and particulars erroneous and contrary to law and equity.

Wherefore, the defendants pray that the said final order, judgment or decree of the United States District Court for the Northern District of Illinois, Eastern Division, rendered and pronounced on the 28th day of April, A. D. 1942, [fols. 101-105] be reversed, or, in the alternative, that the same may be reversed and remanded to the said District Court with appropriate directions, and that the defendants may have all such other, further and different relief and remedy in the premises as the matters appearing upon the record aforesaid may require.

Illinois Commerce Commission, and John D. Biggs, William Parrillo, Frank Peska, Edwin A. Rosenstone and Val J. Washington, individually and as members of and constituting the Illinois Commerce Commission; Dwight H. Green, individually and as Governor of the State of Illinois; George F. Barrett, individually and as Attorney General of the State of Illinois; Thomas J. Courtney, individually and as State's Attorney of Cook County; Illinois; Harry A. Hall, individually and as State's Attorney of Lake County, Illinois; Lee E. Daniels, individually and as State's Attorney of Du Page County, Illinois; Charles G. Seidel, individually and as State's Attorney of Kane County, Illinois; and William M. Carroll, individually and as State's Attorney of McHenry County, Illinois, Defendants-Appellants, by George F. Barrett, Attorney General of the State of Illinois, Attorney for Defendants-Appellants.

[fols. 106-178] Bond on Appeal for $500.00 approved and filed May 25, 1942, omitted in printing.

[fol. 179] IN DISTRICT COURT OF THE UNITED STATES, NORTHERN DISTRICT OF ILLINOIS

[Title omitted]

PRAECIPE FOR RECORD AND PROOF OF SERVICE THEREOF—Filed May 25, 1942

The Clerk of the District Court of the United States for the Northern District of Illinois, Eastern Division, is hereby authorized and directed to prepare and certify a transcript of record in the above entitled cause for transmission to the Supreme Court of the United States, and to include therein true and exact copies of the following:

1. Placita.

2. Complaint of plaintiff for equitable relief, including attached exhibits, filed on or about March 10, A. D. 1942.

[fol. 180] 3. Plaintiff's motion for temporary restraining order, filed on or about March 10, A. D. 1942.

4. Plaintiff's motion for interlocutory injunction, filed on or about March 11, A. D. 1942.

5. Order of court issuing temporary restraining order, entered on or about March 11, A. D. 1942.

6. Bond filed by plaintiff in connection with temporary restraining order, filed on or about March 11, A. D. 1942.

7. Motion of defendant to strike the complaint and dismiss the suit, filed on or about March 20, A. D. 1942.

8. Notice of filing of above described motion, filed on or about March 20, A. D. 1942.

9. Findings of fact and conclusions of law, respecting interlocutory injunction, entered on or about March 21, A. D. 1942.

10. Order of court granting interlocutory injunction and reserving ruling on defendants' motion to strike and dismiss, entered on or about March 21, A. D. 1942.

11. Interlocutory decree, entered on or about March 21, A. D. 1942.

12. Bond filed by plaintiff in connection with interlocutory injunction, filed on or about March 21, A. D. 1942.

13. Findings of fact and conclusions of law, respecting perpetual injunction, entered on or about April 28, A. D. 1942.

14. Order, judgment or decree, denying defendants' motion to strike complaint and dismiss the suit and issuing perpetual injunction, entered on or about April 28, A. D. 1942.

15. Defendants' petition for an appeal to the Supreme Court of the United States.

16. Order of Court allowing an appeal to the Supreme Court of the United States.

17. Defendants' assignments of error on said appeal.

18. Citation to appellee relative to such appeal, and return thereupon.

19. Defendants' appeal bond in connection with said appeal.

20. Defendants' jurisdictional statements filed in connection with said appeal.

21. Defendants' statement directing appellee's attention to the provisions of Paragraph 3 of Rule 12 of the Supreme Court of the United States.

[fols. 181-182] 22. Proof of Service of copies of the above described items 15 to 22, both inclusive, upon appellee.

23. This praecipe for record, together with proof of service thereof.

24. Any statements filed by the appellee making against the jurisdiction of the Supreme Court of the United States, and any motions to dismiss or affirm which may be filed by the appellee.

25. Any praecipe for additional portions of the record which may be filed by the appellee.

26. Certificate of the Clerk to the above designated transcript of record.

George F. Barrett, Attorney General of the State of Illinois, Attorney for Appellants.

PROOF OF SERVICE

Received a copy of the above and foregoing proof of service and copies of the various items therein described this 25th day of May, A. D. 1942.

Charles M. Thomson, As Trustee of the Property of the Chicago and North Western Railway Company, a corporation, plaintiff-appellee.

[fols. 183-184] Clerk's Certificate to foregoing transcript omitted in printing.

[fols. 185-186] Citation in usual form showing service on Charles M. Thomson filed May 25, 1942 omitted in printing.

[fol. 187] In Supreme Court of the United States

Designation of Parts of Record to be Printed—Filed July 3, 1942

The appellants hereby designate the entire record as heretofore filed in this Court as the parts of the record which they think necessary for the consideration of the above entitled cause, and authorize and direct the Clerk of the Supreme Court of the United States to have the said entire record printed, provided, however, that he shall [fol. 187a] omit all duplication, all repetition of titles and all other obviously unimportant matters and make proper note thereof.

George F. Barrett, Attorney General of the State of Illinois, Attorney for Appellants.

Proof of Service

Received a true and exact copy of the above and foregoing Designation of Parts to be Printed, this 1st day of July, A. D. 1942.

William T. Faricy, Hugh F. Morehouse and P. F. Gault, Attorneys for Appellee.

[fol. 187b] In Supreme Court of the United States

Appellants' Statement of the Points upon Which They Intend to Reply—Filed July 3, 1942

I

The order of the Interstate Commerce Commission entered January 21, 1942, relied upon by the plaintiff as authorizing the increase of rates now sought, is void for want of sufficient findings of fact.

[fol. 187c]

II

Whether the order of the Commission is valid or invalid, it does not by its terms purport to do more than withdraw federal opposition from the increased rate schedule; and it is still incumbent upon the railroads to procure appropriate authority from the States with respect to intrastate rates.

III

Nothing in the earlier orders in the proceedings in which the instant order was entered either excuses or supplies the want of findings of a change in conditions justifying an increase in rates.

IV

The legislative character of the order in question did not and could not dispense with the constitutional requirement that administrative orders must be supported by findings of fact.

V

The recitals in the present order and in the supplemental report are insufficient to sustain the order.

VI

The present order is subject to collateral attack by the appellants in the present proceedings.

VII

The present proceeding does not involve any question of appellee's right to relief independently of the order of the Interstate Commerce Commission.

VIII

The trial court erred in denying and in not sustaining defendants' motion to strike the plaintiff's complaint and to dismiss the cause for want of equity upon the merits, and in not striking said complaint and in not dismissing said cause.

[fol. 187d]

IX

The trial court erred in not holding as a matter of law that the purported order of the Interstate Commerce Commission, dated January 21, 1942, set forth and relied upon in plaintiff's complaint, was null, void, and of no force or

effect, because the said order was not supported by adequate or sufficient findings of fact.

X

The trial court erred in failing to hold that the said purported order, even if valid according to its terms and purport, merely permitted the plaintiff to increase the rates, schedules and tariffs mentioned in the said order in so far as there might have existed prior to the entry of such order any federal objection to such increase, but did not exempt the plaintiff from the necessity of obtaining the sanction, authority or permission of the Illinois Commerce Commission before so increasing such intrastate rates, schedules and tariffs.

XI

The trial court erred in restraining and commanding the defendants as in and by the said final order and adjudication they are commanded, restrained and enjoined.

George F. Barrett, Attorney General of the State of Illinois, Attorney for Appellants.

Proof of Service

Received a true and exact copy of the above and foregoing Statement of Points this 1st day of July, A. D. 1942.
William T. Faricy, Nye F. Morehouse and P. F. Gault, Attorneys for Appellee.

[fol. 187e] [File endorsement omitted.]

[fol. 188] Supreme Court of the United States, October Term, 1942

No. 178

Illinois Commerce Commission, John D. Biggs, et al., Appellants,

vs.

Charles M. Thomson, as Trustee, etc.

Order Noting Probable Jurisdiction—October 12, 1942

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdic-

tion is noted and the case is assigned for argument immediately following No. 175.

Endorsed on Cover: File No. 46,672. N. Illinois, D. C. U. S., Term No. 178. Illinois Commerce Commission, John D. Biggs, William Parrillo, et al., Appellants, vs. Charles M. Thomson, as Trustee of the Property of Chicago and North Western Railway Company. Filed June 25, 1942. Term No. 178 O. T. 1942.

FILE COPY

SUPREME COURT, U. S.
FILED
JUN 25 1942
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 178

ILLINOIS COMMERCE COMMISSION, JOHN D. BIGGS, WILLIAM PARRILLO, ET AL.,
Appellants,

vs.

CHARLES M. THOMSON, AS TRUSTEE OF THE PROPERTY OF CHICAGO AND NORTH WESTERN RAILWAY COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

STATEMENT AS TO JURISDICTION.

GEORGE F. BARRETT,
Attorney General of Illinois;
ALBERT E. HALLETT,
Assistant Attorney General of Illinois,
Counsel for Appellants.

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Statutes Cited.

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Section 33 3
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Section 37 4
Section 41 4
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Section 82 4
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IN THE DISTRICT COURT OF THE UNITED STATES, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

No. 4020

CHARLES M. THOMSON, AS TRUSTEE OF THE PROPERTY OF CHICAGO AND NORTH WESTERN RAILWAY COMPANY, A CORPORATION,
Plaintiff-Appellee,

vs.

ILLINOIS COMMERCE COMMISSION, AND JOHN D. BIGGS, WILLIAM PARRILLO, FRANK PESKA, EDWIN A. ROSENSTONE, AND VAL J. WASHINGTON, INDIVIDUALLY AND AS MEMBERS OF AND CONSTITUTING THE ILLINOIS COMMERCE COMMISSION; DWIGHT H. GREEN, INDIVIDUALLY AND AS GOVERNOR OF THE STATE OF ILLINOIS; GEORGE F. BARRETT, INDIVIDUALLY AND AS ATTORNEY GENERAL OF THE STATE OF ILLINOIS; THOMAS J. COURTNEY, INDIVIDUALLY AND AS STATE'S ATTORNEY OF COOK COUNTY, ILLINOIS; HARRY A. HALL, INDIVIDUALLY AND AS STATE'S ATTORNEY OF LAKE COUNTY, ILLINOIS; LEE E. DANIELS, INDIVIDUALLY AND AS STATE'S ATTORNEY OF DUPAGE COUNTY, ILLINOIS; CHARLES G. SEIDEL, INDIVIDUALLY AND AS STATE'S ATTORNEY OF KANE COUNTY, ILLINOIS, AND WILLIAM M. CARROLL, INDIVIDUALLY AND AS STATE'S ATTORNEY OF MCHENRY COUNTY, ILLINOIS,
Defendants-Appellants.

STATEMENT AS TO THE JURISDICTION OF THE UNITED STATES SUPREME COURT ON APPEAL TO REVIEW THE JUDGMENT OR DECREE IN QUESTION.

The defendants-appellants, having presented this day their petition for appeal, now file this their statement of the basis upon which it is contended that the Supreme Court of the United States has jurisdiction on a direct appeal to

review the final order, judgment or decree in question, and should exercise such jurisdiction in this case.

(A) The Statutory Provision Believed to Sustain the Jurisdiction.

This appeal is prosecuted from a final order, judgment or decree which permanently restrains the defendants, Illinois Commerce Commission, and various Illinois state officials, from taking any action against the plaintiff, as Trustee of the property of the Chicago and North Western Railway Company, or his agents, on account of their charging increased fares for intrastate transportation of passengers on said railroad, or on account of their violation of a certain order of the Illinois Commerce Commission entered on February 18, 1942, purporting to suspend the effective date of such increased intrastate tariffs pending an investigation by the Illinois commission into the necessity for and the propriety of such increases, or on account of their violation of a certain Illinois statute, commonly known as the Illinois Two Cent Fare Law, on the general grounds that these statutes and orders are unconstitutional and deprive the plaintiff of property without due process of law and that their enforcement should not be permitted.

The final order, judgment or decree here appealed from was entered in the District Court of the United States for the Northern District of Illinois, Eastern Division, on April 28, A. D. 1942, by a statutory court consisting of one Circuit and two District judges specially convoked under and by virtue of the provisions of Section 266 of the Judicial Code (28 U. S. C. A., sec. 380). The said statute concludes as follows:

> "• • • and a direct appeal to the Supreme Court may be taken from a final decree granting or denying a permanent injunction in such suit."

It is contended that the Supreme Court of the United States has jurisdiction on a direct appeal to review the final order, judgment or decree in question by virtue of the express provisions last above set forth.

(B) The State Statutes and Administrative Orders Which Are Involved.

The plaintiff's complaint contends, *first*, that a certain administrative order entered by the Illinois Commerce Commission on February 18, 1942, temporarily suspending a proposed increase in the plaintiff's intrastate passenger tariffs pending an investigation by the Commission into the propriety of such proposed increases, is unconstitutional in its effect and deprives plaintiff of property without due process of law.

While the attack is upon this particular order and not upon the basic validity of the Illinois statute, it is contended by the plaintiff that the Illinois Public Utilities Act, upon which the said order necessarily must depend for its validity, cannot, consistently with constitutional principles, be regarded as authorizing the order in question. It is, therefore, quite obvious that the case does necessarily precipitate the question of whether the said Illinois statute above referred to can constitutionally be applied to the plaintiff in the instant case.

The Illinois Public Utilities Act (Illinois Revised Statutes, Chapter 111⅔, sections 1-95, inclusive), above referred to, provides in substance, as follows:

Section 9, requires public utilities to obey the orders of the Commission.

Section 33, requires public utilities to file schedules of their tariffs with the Commission.

Section 34, requires public utilities to publish such schedules.

Section 35, prohibits public utilities from rendering services without filing schedules.

Section 36, prohibits public utilities from modifying their tariffs without notice to the Commission, and provides that the Commission may suspend the effective date of such new tariffs pending an investigation into their propriety but not for more than 120 days, plus an extension of 6 months if such investigation is not then completed.

Section 37, prohibits such utilities from charging more or less than their published tariffs.

Section 41, authorizes the Commission to fix and determine public utility rates.

Section 64, authorizes the Commission to hold investigations as to public utility rates.

Section 80, provides penalties for any violation of the Act.

Section 81, makes persons violating the Act guilty of a misdemeanor and subject to fines not to exceed $1,000.

Section 82, provides for actions to recover penalties for violations of the Act.

The complaint *further* contends that a certain Illinois statute, commonly known as the Illinois Two Cent Fare Law, approved May 27, 1907, as amended in 1913 (Illinois Revised Statutes, Chapter 114, Sections 154-156), is likewise unconstitutional and deprives plaintiff of property without due process of law. This Act provides, in effect, that it shall be unlawful for any railroad company carrying passengers between points in Illinois to charge in excess of two (2) cents per mile for such passage, and provides certain penalties for violations of such provisions to be recovered by actions to be brought by the Attorney General of the State, or by the State's Attorney of any county in which such railroad operates.

(C) The Date of the Judgment or Decree Sought to Be Reviewed, and the Date Upon Which the Application for Appeal Is Presented.

The final order, judgment or decree here sought to be reviewed was entered and spread of record on April 28, A. D. 1942.

The petition for appeal herein was presented and filed on May 25, A. D. 1942.

(D) Statement Showing That the Nature of the Case and of the Rulings of the Court Was Such as to Bring the Case Within the Jurisdictional Provision Relied Upon.

On January 21, 1942, the Interstate Commerce Commission entered a purported order which, according to plaintiff's assertions, authorized, *inter alia*, a 10% increase in intrastate passenger tariffs (Plaintiff's Complaint, Exhibit B). Asserting (1) that the said order was valid and (2) that its effect was peremptorily to authorize a 10% increase in the tariffs which it contemplated, the plaintiff filed a schedule of increased intrastate tariffs with the Illinois Commerce Commission and with the Interstate Commerce Commission.

Pursuant to the statutory provisions of the Illinois Public Utilities Act, hereinbefore summarized, the Illinois Commerce Commission, on February 18, 1942, entered an order temporarily suspending the effective date of such proposed higher intrastate tariffs, pending an investigation by the Commission into the propriety of the proposed increases, until July 6, 1942, subject to the further order of the Illinois Commission, and forbade the plaintiff to alter the schedule of rates theretofore in effect until the expiration of the said temporary suspension order unless specifically authorized so to do by the Illinois Commission (Exhibit C, attached to plaintiff's complaint).

On March 10, 1942, the plaintiff (appellee), as Trustee of the property of the Chicago and North Western Railway Company, filed his complaint for equitable relief against the Illinois Commerce Commission, its individual members, the Attorney General of Illinois, and the State's Attorneys of five counties, seeking to restrain these defendants from interfering with plaintiff's charging fares for intrastate passenger transportation in accordance with the schedule of increased rates purported to have been approved by the Interstate Commerce Commission, as aforesaid.

This complaint attacked the validity and constitutionality not only of the order of the Illinois Commerce Commission, above summarized, but of the Illinois Two Cent Fare Law, also above summarized, and sought both interlocutory and permanent injunctions against all of the defendants.

On March 11, 1942, a temporary restraining order was entered by the District Judge, who set the hearing on the prayer for an interlocutory injunction for a date certain and called one Circuit Judge and one District Judge to his assistance, as required by Section 266 of the Judicial Code (28 U. S. C. A. Sec. 380).

On March 21, 1942, an interlocutory injunction was entered by the said statutory three-judge court so convoked, and on April 28, 1942, these same three judges entered the permanent injunction from which this appeal is now prosecuted.

The case was heard and determined and the said final injunction was predicated entirely upon the plaintiff's complaint and a motion by the defendants to dismiss such complaint and action. This motion raised two substantial questions of law, both of which were fully argued before the court, and were, in substance, as follows:

First: That the purported order of the Interstate Commerce Commission of January 21, 1942, was invalid be-

cause not supported by adequate findings of the facts upon which it was based, it being particularly contended by the defendants that the recitals in the order were in their essential content and substance similar to those repeatedly condemned and held insufficient by this Court.

Second: That even if the order be regarded as valid according to its terms, nevertheless its intent was not peremptorily to authorize a 10% increase in passenger fares, but was merely to sanction such increase in rates if the states should assent thereto or not oppose the same.

(E) Statement of the Grounds Upon Which It Is Contended That the Questions Involved Are Substantial.

Summary.

Two questions are presented to the court on this appeal. *First:* Whether the order of the Interstate Commerce Commission, upon which the plaintiff's action necessarily depends, is *valid* and effective. It is the defendants' position that this order is invalid because it contains no adequate findings of fact. *Second:* Whether (even assuming it to be valid) the order of the Commission is of such a character as to *establish* and *install* the new schedule of higher tariffs, or whether it merely permits the various railroads to apply to the appropriate commissions of the several States for such increases. It is the position of the defendants that the effect of this order is merely to withdraw all Federal obstacles to the proposed increases and to authorize the railroads to apply to the commerce commissions of the several States for their approval of the proposed increases in purely intrastate tariffs.

It is contended that *both* of these questions are *substantial*, are highly debatable, and are of such a character as to affect railroads not only throughout the State of Illinois, but throughout the entire United States.

The Facts.

Prior to and on March 7, 1942, the plaintiff collected the intrastate passenger fares fixed by an order of the Interstate Commerce Commission of October 6, 1925, in a proceeding entitled "In the Matter of Intrastate Rates Within the State of Illinois, No. 11703 (102 I. C. C. 479)." A copy of this order appears as Exhibit "A" to the complaint.

In December, 1941, the Interstate Commerce Commission undertook a "further nationwide general investigation of both freight rates and passenger fares to determine whether or not an increase of ten per cent therein should be authorized," that proceeding being known as "Ex Parte 148 Increased Railway Rates, Fares, and Charges, 1942." On January 22, 1942, that Commission

> "authorized the railroads, including the plaintiff herein, to increase their passenger rates, fares and charges ten per cent" (*Plaintiff's complaint*, page 10.)

A copy of this order appears as Exhibit "B" to the complaint.

It is upon this order and upon this order alone that the plaintiff founds his contention that it is at once his right and his duty to charge the fares approved in such order. The plaintiff's complaint is not conceived in form or substance upon the theory that it asserts a right to have the propriety of the schedule of increased rates determined by a court independently of and without regard to the order of the Commission.

The first two paragraphs of the order recite matter of procedural history—the filing of the petitions, the notification of the authorities of all states, the fact that hearings have been had and investigation made, and that the Commission has had the co-operation and advice of a committee consisting of members of state regulatory authorities.

The only recital purporting to state the basis for the order is contained in the third and fourth paragraphs, which are in full as follows:

> "*It further appearing*, that the increase in fares proposed is necessary to meet, in part, increased operating expenses incurred or to be incurred by said petitioners because of the payment by them of (a) increased wages to employees, (b) increased cost of materials and supplies, and (c) additional expenditures to safeguard petitioners' properties and operations during the present emergency; the details of which will be stated in a report hereafter to be made respecting the proposed increased freight rates and charges;
>
> "And the Commission does hereby find that the increase in fares proposed is necessary to enable petitioners to continue to render adequate and efficient railway transportation service during the present emergency; and that, upon consideration of said petitions and the evidence of record, that the proposed increased fares will be reasonable and lawful."

The provisions of the order expressing its purpose and operative effect are as follows:

> "*It is ordered*, That the increased passenger fares as proposed by the said petitioners be, and they are hereby, approved, provided that where the total increased fares are less than $1 fractions of less than one-half cent shall be dropped and fractions of one-half cent or greater may be increased to the next whole cent, and that where the total increased fares are more than $1 such fares shall end in 0 or 5, but no more than 2.5 cents shall be added to the present fares as increased by 10 per cent in order to make such total fares end in 0 or 5.
>
> "*It is further ordered*, That all outstanding orders, as amended, of the Commission, authorizing or prescribing interstate and intrastate fares, or bases of fares, be, and they are hereby, modified, effective concurrently with the establishment of the increased fares

herein approved, only to the extent necessary to permit the increase herein authorized to be added to the interstate and intrastate fares approved or prescribed in, or maintained or held by virtue of, said outstanding orders; and that a copy of this order shall be filed in the docket of each such proceeding, including those proceedings under section 13 of the Interstate Commerce Act enumerated in the order of February 28, 1936, in docket No. 26550, *Passenger Fares and Surcharges*.

"*It is further ordered*, That all tariffs or supplements changing fares by authority of this order, which are maintained or held by authority of outstanding orders of the Commission, shall bear on their title pages specific reference to this order.

"*It is further ordered*, That the increased fares herein authorized may be made effective upon not less than 10 days' notice to the Commission and to the general public by publishing, filing, and posting in the manner provided in section 6 of the Interstate Commerce Act; and that a copy of this order be served on each of said petitioners and on the Governors of the several States.

"*And it is further ordered*, That jurisdiction be, and it is hereby, retained by the Commission, for the purpose of determining, if need be, the lawfulness of any particular fare or fares, resulting from this order.

"The Commission not yet having determined the remaining issues involved, namely, those relating to the rates and charges for the transportation of freight, and services connected therewith, and for the transportation of milk and cream, jurisdiction is hereby retained for the purpose of further consideration and determination of such other issues herein."

The complaint also refers to a supplemental report of the Commission of March 2, 1942, and quotes therefrom the following language:

"Because of the abnormal conditions which now prevail throughout the country we are of the opinion that

the increased fares proposed will yield substantial amounts of additional revenues, and that the passenger service justly and reasonably should contribute to meeting the added operating costs of the railroads.

"In an appropriate order made in this proceeding on January 21, 1942, we found that the increase in fares proposed is necessary to enable the petitioners to continue to render adequate and efficient railway transportation service during the present emergency, and that the proposed increased fares will be reasonable and lawful. We therein approved the proposed increased fares subject to a suitable rule for the disposition of fractions stated in the order.

"All our outstanding orders, as amended, authorizing or prescribing interstate and intrastate fares, or bases of fares, were modified by that order, effective concurrently with the establishment of the increased fares therein approved, to the extent necessary to permit the authorized increase to be added to the interstate and intrastate fares approved or prescribed in, or maintained or held by virtue of, such outstanding orders. We retained jurisdiction for the purpose of determining, if need be, the lawfulness of any particular fare or fares resulting from that order. Increased fares were filed and became effective February 10, 1942.

"The foregoing findings as made in our order of January 21, 1942, are here renewed and affirmed."

The complaint and exhibits set forth no other matter in the nature of findings supporting the order. However, although the pleadings do not require either the defendants or this Court to recur to portions of the report of March 2, 1942, not set forth in the complaint and not before the court, and although perhaps strict practice would not even permit us to search records not pleaded in order to find a further basis upon which the order in question might be aided or supported, the defendants do not insist upon a technical attitude which would restrict the vision of this Court to the letter of the complaint and its accompanying

exhibits. The defendants have therefore independently examined the last mentioned report in quest of further matter in the nature of findings in support of the complaint. For the convenience of the court, and for such comfort as the report at large may afford the plaintiff in this case, the defendants quote, in an appendix to this statement, *all* of the recitals of the Commission in the report under the caption of "Passenger Fares and Passenger Train Service." Upon consulting these recitals, it will appear that the findings incorporated in the order proper are not substantially amplified.

Propositions and Authorities.

I.

The order of the Interstate Commerce Commission entered January 21, 1942, relied upon by the plaintiff as authorizing the increase of rates now sought, is void for want of sufficient findings of fact.

State of Florida v. *United States*, 282 U. S. 194;
U. S. v. *Chicago, M. St. P. & P. R. Co.*, 294 U. S. 499;
Wichita R. R. Co. v. *Public Utilities Commission*, 260 U. S. 48;
Atchison Ry. v. *U. S.*, 295 U. S. 193;
Panama Refining Co. v. *Ryan*, 293 U. S. 388;
U. S. v. *Louisiana*, 290 U. S. 71;
Georgia Commission v. *United States*, 283 U. S. 765.

II.

Whether the order of the Commission is valid or invalid, it does not by its terms purport to do more than withdraw Federal opposition from the increased rate schedule; and it is still incumbent upon the railroads to procure appro-

priate authority from the States with respect to intrastate rates.

Transit Commission v. *Long Island Ry. Co., et al.*, not yet officially reported but reproduced in full as Appendix C of this statement.

ARGUMENT.

I.

The order of the Interstate Commerce Commission entered January 21, 1942, relied upon by the plaintiff as authorizing the increase of rates now sought, is void for want of sufficient findings of fact.

It is the first contention of the defendants that the order in question is clearly void when its terms are measured by the constitutional standards for the validity of such orders as those standards have been repeatedly announced by this Court. More particularly, the defendants maintain that the only recitals in the order assuming to state its basis in fact are precisely the sort of statements which have been consistently condemned by this Court as wholly inadequate to impart validity to the acts of the Interstate Commerce Commission.

The decisions of this Court to be cited and discussed hereafter establish two cardinal principles applicable to this case:

First. The firmly established constitutional requisite of due process of law that orders of administrative boards must contain findings of fact, when that requirement is applied specifically to orders of the Interstate Commerce Commission in rate cases and like matters, is *not* met by the mere statement that a schedule of rates is "fair," "reasonable," "necessary to prevent unjust discrimination," or similar generali-

ties of conclusion. On the contrary, the order must set forth, at very least in terms of approximation or estimate, the nature, extent, and proportion of the financial burden entailed upon the carriers by the service for which the rates are charged. In specific application to the instant case, it will be shown that the findings in the order relied upon by the plaintiff are very similar to findings repeatedly denounced by this court in like cases.

Second. That an order which is unsupported by adequate findings is vulnerable to collateral and independent attack in equity by the carrier, a shipper or consumer, or the state; so that if the present order is invalid for want of proper findings, the defendants may assail it in these proceedings.

The Findings in the Present Order.

The first two paragraphs of the order recite merely the initiation of the proceedings, the giving of notice, the conducting of hearings, and reception of evidence, and other matters of procedural history.

The only matter in the order which even assumes the form of a recital of facts supporting the terms of the order is the third and fourth paragraphs, which are in full as follows:

> "*It further appearing*, That the increase in fares proposed is necessary to meet, in part, increased operating expenses incurred or to be incurred by said petitioners because of the payment by them of (a) increased wages to employes, (b) increased cost of materials and supplies, and (c) additional expenditures to safeguard petitioners' properties and operations during the present emergency; the details of which will be stated in a report hereafter to be made respecting the proposed increased freight rates and charges;
>
> "And the Commission does hereby find that the increase in fares proposed is necessary to enable peti-

> tioners to continue to render adequate and efficient railway transportation service during the present emergency; and that, upon consideration of said petitions and the evidence of record, that the proposed increased fares will be reasonable and lawful:"

The only other matter which assumes to state the basis for the order is the statement or commentary incorporated in the "report of March 2, 1942" but not in existence at the time that the order was entered. This matter is not pleaded and strictly is not accessible to the scrutiny of the court on the pleadings. However, the defendants have reproduced it in full as an appendix to this statement (Appendix C).

The following comment as to this additional matter is appropriate:

The supplementary material sets forth in some detail the previous schedule of fares, which schedule, of course, appears in prior orders of the Commission. Neither the order proper nor the report shows any of the following pertinent information:

1. The total expense of passenger service or the proportion of total expense of all railway service fairly allocable to passenger service upon a basis apportioning the cost of operating the entire railway system as between freight and passenger service is not set forth. Quite obviously, much equipment—such as tracks, signal and switching facilities, office and general quarters, and the like—as well as the services of many employees, must be used both for freight and passenger service. It is impossible to discover the basis upon which, in the language of the Commission, in Sheet 13 of the report of March 2,

> "the passenger service justly and reasonably should contribute to meeting the added operating costs of the railroad."

2. Any estimate in terms of dollars and cents, passenger miles, or other terms, of the contemplated effect of the emergency upon passenger revenues. The language most nearly pertinent as a response to the problem of the effect of the emergency upon passenger traffic is the following:

> "Petitioners express confidence that the increase proposed will not curtail the travel volume, which they estimate will not be less in 1942 than it was in 1941. Business and economic conditions are more favorable for rail travel than in 1936 when the present maximum basis of 3 cents in sleeping and parlor cars and 2 cents in coaches was prescribed by us. An important contributing factor is the recent curtailment of automobile production and a scarcity of rubber tires for automobiles." (Sheet 13 of the report.)

Thus, for aught that appears, the

> "recent curtailment of automobile production and a scarcity of rubber tires for automobiles"

may not only

> "not curtail the travel volume"

but may so vastly increase it as to render the increase in receipts under *present* rates lucrative to a degree out of all proportion to the increased cost of carrying passengers on cars already running but previously half filled, using stations already built, and otherwise exploiting the facilities and services already available and partially idle.

3. In short, it is quite impossible to discern either in the text of the order proper or in the supplementary report, which was not available until after the order was supposed to be effective, what the Commission's findings and conclusions may be with respect to the impact of the national emergency upon the railroads. The order and report abound in generalities and categorical pronouncements to the effect that increased costs, wages and other expenses, as well as

increase of business, will require increased revenues. But no one can tell how the Commission may have comparatively estimated the rise in wages and prices on the one hand, and the increase in the volume of business, on the other hand.

The court is now respectfully asked, on the one hand, to compare the language above quoted with recitals previously condemned by this Court as insufficient to support a valid order; and on the other hand, to contrast that language with findings which *have* been held sufficient to satisfy the requirements of due process of law.

Cases Holding Orders Void for Want of Sufficient Findings and Subject to Collateral Attack in Equity.

The first case relied upon by defendants is that of *State of Florida* v. *United States*, 282 U. S. 194.

In that case, as in the present case, the order under consideration was made by the Interstate Commerce Commission. Like the order in the present case, it provided for an increase of rates on intrastate commerce in order to equalize proportionately the burden to be borne by such commerce with that borne by interstate traffic. The findings of the Commission appear at pages 206-207 of the official reporter and are quoted in full in the margin of this statement.[1]

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[1] "We find that the interstate rates on logs, except walnut, cherry and cedar, in carloads, from points on defendant's lines in Florida north of and including Jacksonville, Gainesville, Burnett's Lake, and High Springs, to destinations on its lines in Georgia for distances not exceeding 170 miles are, and for the future will be, unreasonable to the extent that they exceed, or may exceed, the following distance scale of rates in cents per 100 pounds, minimum weight 40,000 pounds, which rates we find are and will be reasonable" (inserting schedule) • • •

"We further find that the Florida intrastate rates assailed, which are lower than the interstate rates herein found reasonable for corresponding distances, result, and will result, in undue preference and advantage of shippers of intrastate traffic within the State of Florida, in undue prejudice

It will be observed that in the *State of Florida case*, the Commission found in substance that the prevailing rates were

> "unreasonable to the extent that they exceeded"

the prescribed new rates; that they would

> "result in undue preference and advantage of shippers of intrastate traffic, * * * shippers of interstate traffic from points in * * * Florida to points in * * * Georgia, and in unjust discrimination against interstate commerce";

and that such

> "undue preference and advantage * * * should be removed by the establishment"

of the rates fixed by the order.

(It will be recalled that in the order in the *instant* case the Commission found that the increase in fares

> "is necessary to meet, in part, increasing operating expenses * * * because of * * * (a) increasing wages to employees, (b) increasing costs of materials and supplies, and (c) additional expenditures to safeguard petitioner's properties and operations during the present emergency,"

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to shippers of interstate traffic from points in the State of Florida to points in the State of Georgia, and in unjust discrimination against interstate commerce.

"We further find that said undue preference and advantage, undue prejudice, and unjust discrimination can and should be removed by the establishment of rates for intrastate application within Florida which shall correspond with the rates herein found reasonable for interstate application from Florida to Georgia.

"We further find that whether the aforesaid rates pertain to transportation in interstate commerce or to transportation in intrastate commerce the transportation services in each instance are performed by defendant under substantially similar circumstances and conditions."

and that the increase

> "is necessary to enable petitioners to continue to render adequate and efficient railway transportation service during the present emergency,"

it being further stated

> "that the proposed increase in fares will be reasonable and lawful."

The instant order contains no more specific findings.)

This Court held that the order was invalid and subject to collateral attack in equity by the State of Florida because the findings were insufficient. The court said at page 215:

> "The question is not merely one of the absence of elaboration or of a suitably complete statement of the grounds of the Commission's determination, to the importance of which this court has recently adverted (*Beaumont, Sour Lake & Western Railway Co.* v. *United States*, decided November 24, 1930, 282 U. S. 74, 51 S. Ct. 1, 75 L. Ed. 221), but of the lack of the basic or essential findings required to support the Commission's order. *In the absence of such findings, we are not called upon to examine the evidence in order to resolve opposing contentions as to what it shows or to spell out and state such conclusions of fact as it may permit.* The Commission is the fact-finding body, and the Court examines the evidence not to make findings for the Commission but to ascertain whether its findings are properly supported. If the facts as to intrastate transportation of logs in Florida are such as to justify an order as to intrastate rates in order to end an unjust discrimination as against interstate commerce either as between persons and localities, or because of an undue burden upon the revenues of the carrier, the Interstate Commerce Commission is still at liberty, acting in accordance with the authority conferred by the statute, to make such determinations as the situation may require.

> "We conclude that the portion of the order of the Commission which is now under review, with respect to intrastate rates, is not supported by the findings of the Commission and this part of the order must be set aside." (Emphasis supplied.)

Another decision immediately applicable to the present case is that of

U. S. v. *Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499.

That case involved the validity of an order of the Interstate Commerce Commission in respect to interstate and intrastate rates for the shipment of coal in the Illinois and Indiana coal fields. In that case the Commission refused to approve a schedule of tariffs increasing the rates, so that its ruling was adverse to the carrier. There it was the railroad, not the state, which complained of inadequate findings. The recitals in question appear at page 505 of the official report and are set forth in full in the margin.[2]

Again affirming its adherence to the constitutional principle requiring that orders of administrative boards must be sustained by adequate findings and making clear that evidence without findings is as impotent to sustain such an order as would be findings without evidence in the record, this Court said at page 504:

> "This court has held that an order of the Interstate Commerce Commission is void unless supported by findings of the basic or *quasi*-jurisdictional facts con-

[2] "We find that the proposed rates if permitted to become effective would lead to a disruption of the rate structure on coal in the Indiana and related areas, thus impairing the revenue of the carriers serving those areas and their ability to provide the adequate and efficient transportation service contemplated by section 15a of the act; that they would cause a disruption of the individual groups from which the rates are proposed; and that they would cause a disruption of the long-standing rate relation existing for competitive purposes, between the several Indiana groups.

"We find that the proposed rates would be unreasonable and in violation of sections 1(5) (which denounces unreasonable charges) and 15a (2) of the act (which has been summarized above)."

ditioning its power. *Florida* v. *United States*, 282 U. S. 194, 215; *United States* v. *Baltimore & Ohio R. Co.*, 293 U. S. 454. 'In the absence of such findings, we are not called upon to examine the evidence in order to resolve opposing contentions as to what it shows or to spell out and state such conclusions of fact as it may permit.' *Florida* v. *United States*, *supra*. Orderly review requires that this objection, being basic and jurisdictional, be disposed of at the beginning."

Applying this principle to the findings of that case, this Court said further at page 507:

"There is not a fact stated in the report to indicate that it will be unjust or impracticable to apply the new Milwaukee rates to the other lines in Indiana after increasing them by the differentials hitherto prevailing. There is not a fact to indicate that the rates so reduced will be less than compensatory or that capacity for service to the public will be impaired or put in jeopardy. 'The raising of rates does not necessarily increase revenue. It may in particular localities reduce revenue instead of increasing it, by discouraging patronage.' *Florida* v. *United States*, *supra*, p. 214."

We ask the Court's especial attention to the following statement at page 508:

"*At the very least the findings should inform us, if only approximately, of the extent of the expected loss;* they should make it clear whether the impairment of revenues will be trivial or substantial, for only thus can the impairment be related to capacity for service. Cf. *Florida* v. *United States*, 292 U. S. 1, 9."

The similarity between the findings in that case and those in the instant case is very striking. In the cited case there was a finding that the rates would result in

"impairing the revenue of the carriers . . . and their ability to provide the adequate and efficient trans-

portation service contemplated by section 15a of the act,"

In the instant case the recital of the Commission most nearly resembling in its content the finding of a substantial fact is the declaration that

> "the increase in fares proposed is necessary to enable petitioners to continue to render adequate and efficient railroad transportation service during the present emergency."

Thus the essential substance of the findings in the *Chicago and Milwaukee case* last above cited is identical with that of the findings in the present case.

Another utterance of this Court declaring the requirement of adequate findings to be constitutional and of the essence of due process of law is that to be found in the case of

Wichita R. R. Co. v. *Public Utilities Commission*, 260 U. S. 48. The Court said at page 58:

> "This conclusion accords with the construction put upon similar statutes in other States. *Public Utilities Commission* v. *Springfield Gas & Electric Co.*, 291 Ill. 209; *Public Utilities Commission* v. *Baltimore & Ohio Southwestern R. R. Co.*, 281 Ill. 405. Moreover, it accords with general principles of constitutional government. The maxim that a legislature may not delegate legislative power has some qualifications, as in the creation of municipalities, and also in the creation of administrative boards to apply to the myriad details of rate schedules the regulatory police power of the State. The latter qualification is made necessary in order that the legislative power may be effectively exercised. In creating such an administrative agency the legislature, to prevent its being a pure delegation of legislative power, must enjoin upon it a certain course of procedure and certain rules of decision in the performance of its function. It is a wholesome and necessary prin-

ciple that such an agency must pursue the procedure and rules enjoined and show a substantial compliance therewith to give validity to its action. *When, therefore, such an administrative agency is required as a condition precedent to an order, to make a finding of facts, the validity of the order must rest upon the needed finding. If it is lacking, the order is ineffective.*" (Emphasis supplied.)

In the case of *Atchison Ry.* v. *United States*, 295 U. S. 193, this Court held that an order of the Interstate Commerce Commission purporting to regulate yardage charges was invalid for want of adequate findings. That case was an important one in its bearings upon the economics of transportation. The question presented to the Commission in the proceedings was whether certain services relating to the penning and care of livestock were a final part of the services of the railway as a carrier or were the first phase of the course of commerce after railway transportation had ceased, the livestock being regarded as having been delivered to the consignee so that the services in question were not rendered by the railway as a carrier, but as an additional service for which an extra charge could be made. The purely general and therefore insufficient character of the findings sufficiently appears from the language in which the court pronounces them inadequate to support a valid order. The court said at page 201:

"But the Commission, in respect of the shipments covered by its order, made no definite finding as to what constitutes complete delivery or where transportation ends. Its report does not disclose the basic facts on which it made the challenged order. This court will not search the record to ascertain whether, by use of what there may be found, general and ambiguous statements in the report intended to serve as findings may by construction be given a meaning sufficiently definite and certain to constitute a valid basis for the order.

in the absence of a finding of essential basic facts, the order cannot be sustained. *Florida* v. *United States*, 282 U. S. 194, 215. *Recently this court has repelled the suggestion that lack of express finding by an administrative agency may be supplied by implication. Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 433. See *Beaumont, S. L. & W. Ry.* v. *United States*, 282 U. S. 74, 86. *Interstate Commerce Comm'n.* v. *Chicago B. & Q. R. Co.*, 186 U. S. 320, 341."

The cases above considered all deal with orders of the Interstate Commerce Commission with the exception of the case of *Wichita R. R. Co.* v. *Pubblic Utilities Commission*, which involved the order of a state public service commission. Counsel writing this brief perceive no occasion for multiplying citation of other cases of this Court and the many decisions of Federal and State courts which similarly emphasize as indispensable the requirement that the orders of administrative boards, tribunals and commissions be supported by adequate findings.

However, in concluding our discussion of authorities holding such orders invalid in the absence of such findings, we briefly refer the court's attention to the leading case of *Panama Refining Co.* v. *Ryan*, 293 U. S. 388.

In that case this Court, speaking through Mr. Chief Justice Hughes, pronounced invalid the executive order of the President prohibiting the transportation in interstate and foreign commerce of "hot oil and petroleum products." that is, oil and petroleum products produced or withdrawn from storage in excess of prescribed quotas. Neither economic crisis, social emergency, nor the prestige of the Chief Executive was permitted to absolve the order from the requirements of due process of law, or to warrant a dispensation from constitutional principles. The court said at page 431:

"There is another objection to the validity of the prohibition laid down by the Executive Order under

§9 (c). The Executive Order contains no finding, no statement of the grounds of the President's action in enacting the prohibition. Both §9 (c) and the Executive Order are in notable contrast with historic practice (as shown by many statutes and proclamations we have cited in the margin) by which declarations of policy are made by the Congress and delegations are within the framework of that policy and have relation to facts and conditions to be found and stated by the President in the appropriate exercise of the delegated authority."

The court further said at page 432:

"As the Court said in *Wichita Railroad & Light Co. v. Public Utilities Comm'n*, 260 U. S. 48, 59; 'In creating such an administrative agency the legislature, to prevent its being a pure delegation of legislative power, must enjoin upon it a certain course of procedure and certain rules of decision in the performance of its function. It is a wholesome and necessary principle that such an agency must pursue the procedure and rules enjoined and show a substantial compliance therewith to give validity to its action. *When, therefore, such an administrative agency is required as a condition precedent to an order, to make a finding of facts, the validity of the order must rest upon the needed finding. If it is lacking, the order is ineffective.* It is pressed on us that the lack of an express finding may be supplied by implication and by reference to the averments of the petition invoking the action of the Commission. We cannot agree to this.' Referring to the ruling in the *Wichita* case, the Court said in *Mahler v. Eby*, 264 U. S. 32, 44: 'We held that the order in that case made after a hearing and ordering a reduction was void for lack of the express finding in the order. We put this conclusion not only on the language of the statute but also on general principles of constitutional government.'"

Cases Holding Findings Sufficient to Support Orders entered Thereon.

In order incisively to demonstrate the inadequacy of the findings embodied in the present order, the defendants now ask the court briefly to consider cases in which the findings of administrative commissions *have* been pronounced sufficient to sustain orders based thereon. An examination of such cases will indicate immediately the marked contrast between the character of those findings which have been *approved* and those in the instant case; and it will be readily perceived that the findings in the instant order are indistinguishably similar in substance to the orders condemned (cases cited, *ante*) but vastly different in character from those which have been sustained.

It should be here observed that the defendants have not selected cases in which the findings were virtually perfect merely in order to make more vivid the distinction between the findings in the instant order and those which have been pronounced sufficient or simply to enhance the contrast. On the contrary, we have selected the cases in which, even though the findings have been approved, they have been criticized and censured.

Such a case is that of

U. S. v. Louisiana, 290 U. S. 71.

In that case, the order was seriously assailed on the ground that the findings were inadequate by the State of Louisiana. A district court of three judges acceded to the argument attacking the order and held that the findings were insufficient to support the order.

This Court, speaking through Mr. Justice Stone, criticized the findings, but concluded that they contained sufficient substance of fact to support the order.

That case, like the present case, involved an order prescribing an increase in intrastate rates. But in that case,

the Commission (incorporating by reference the findings in collateral proceedings) found that

> "the plan outlined in the appendix we estimate will produce between one million and one hundred and twenty-five million dollars' increased revenue on the basis of present traffic, if applied both state and intrastate."

Summarizing the substantial content of the findings, the court said at page 80:

> "There are no formal requirements for the findings to be made by the Commission in this type of case, see *Manufacturers Ry. Co.* v. *United States*, 246 U. S. 457, 490, and while the particular form in which they were cast here is not to be commended, the report, read as a whole, sufficiently expresses the conclusion of the Commission, *based upon supporting data, including estimates of experienced railroad traffic men, to which the report refers*, that the probability of increased revenue was sufficiently great to make the increase of rates a reasonable exercise of sound managerial judgment. This, we think, meets the requirements of the statute." (Emphasis supplied.)

It will be observed that even when it affirmatively appeared from the order that

> "the conclusion of the Commission, based upon supporting data, including estimates of experienced railroad traffic men, *to which the report refers*,"

the court held that even these findings were

> "not to be commended."

Apparently this case indicates the limit to which the Commission may go in generality without incurring condemnation more severe than adverse criticism.

The court in the *Louisiana* case last cited *distinguishes* the case of *Florida* v. *The U. S.*, 282 U. S. 194, first cited

by defendants in the present brief, in the following language at page 79:

> "A question different from that before us was presented in *Florida* v. *United States, supra.* There the discrimination was essentially one of undue prejudice against shippers, confined by the evidence to rates prevailing in northern Florida. It involved only one railroad and one commodity. It was not the general revenue proceeding authorized by § 15a. The Court was careful to point out that the Commission had undertaken to establish a statewide level of intrastate rates *without any findings with respect to the corresponding interstate traffic which would tend to support the conclusion that a state-wide alteration of intrastate rates was necessary to protect the interstate commerce* involved." (Emphasis supplied.)

Another case indicating the sort of findings which have been upheld by this Court is

Georgia Comm. v. *United States*, 283 U. S. 765.

The Court said at page 773:

> "*Third.* The appellants contend that the order is void because there are no adequate findings of undue disparity between the rates charged for intrastate transportation in Georgia and the rates actually in force for interstate transportation; and also because there was no finding that the intrastate rates imposed an undue burden upon the carriers' interstate revenues or that the alteration of the intrastate rates would produce additional revenue. The findings in the report are definite and comprehensive. *There are, moreover, illustrative specific findings which confirm the general ones and show that in a real sense, and to a substantial degree, undue prejudice and discrimination to interstate shippers and localities have resulted and will result.*" (Emphasis supplied.)

From the language emphasized above, it appears that there were

> "illustrative specific findings which confirm the general ones"

and that it appears

> "in a real sense, and to a substantial degree, undue prejudice and discrimination"

would result. No such demonstrative material is to be found in the order in the present case.

The Application of the Foregoing Authorities to the Findings in the Instant Case.

The defendants now ask the Court to note the immediate force of the decisions considered above in the instant case.

In the case of *U. S.* v. *Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499, this Court in speaking of the findings of the Commission, said at page 507:

> "There is not a fact to indicate that the rates so reduced will be less than compensatory, or that capacity for service to the public will be impaired or be in jeopardy."

This observation was made notwithstanding a purported "finding" in general terms that the proposed rates would result in

> "impairing the revenue of the carriers * * * and their ability to provide the adequate and efficient transportation service contemplated by section 15a of the act."

In the instant case there is no finding of fact showing that the rates before the authorized increase were confiscatory.

In the same case the Court said at page 508:

> "At the very least the findings should inform us, if only approximately, of the extent of the expected loss."

There is not a word in the findings in the instant case to indicate the "extent" of the inadequacy of the previous rate structure or of the "expected loss" or deficit to be anticipated from the previous rates.

In that case this Court expressly condemned the mere pronouncement that

> "the proposed rates would be 'unreasonable,'"

characterizing such pronouncement as

> "a conclusion insufficient as a finding unless supported by facts more particularly stated."

In the present order there is merely the finding that the

> "proposed increased fares will be reasonable and lawful."

In *State of Florida* v. *United States*, 282 U. S. 194, this Court similarly pronounced insufficient a mere purported finding that the rates were "unreasonable" and would

> "result in undue preference and advantage to shippers of intrastate traffic,"

and that such

> "undue preference and advantage • • • should be removed"

by the establishment of the rates fixed by the order.

It is respectfully submitted that upon no rational theory can a decision sustaining as valid the order in the instant case be reconciled either with the general principle requiring adequate findings as indispensable to due process of law, or with the clear and specific application of that prin-

ciple by this Court in cases immediately apposite to the instant case.

An Order Invalid for Want of Sufficient Findings Is Subject to Collateral Attack in Equity.

It will be noted that the cases heretofore cited, in which orders of the Interstate Commerce Commission were held invalid, were independent proceedings in equity. It was held without question that the enforcement of a void order would be enjoined in equity. If equity will affirmatively *enjoin* the execution of a void order, necessarily it will refuse its active aid in upholding such an order.

II.

Whether the order of the Commission is valid or invalid, it does not by its terms purport to do more than withdraw Federal opposition from the increased rate schedule; and it is still incumbent upon the railroads to procure appropriate authority from the States with respect to intrastate rates.

Under Point I of this statement it was argued that the order of the Interstate Commerce Commission is invalid for want of sufficient findings to support its provisions. If that contention is sound, the plaintiff's case necessarily fails and the considerations developed under the present Point are academic.

Under the present Point, the defendants urge an independent and distinct objection to the plaintiff's complaint. The defendants maintain that without regard to the validity or invalidity of the order, it purports to do no more than remove any restraint existing by virtue of previous orders of the Commission upon the railways of the nation so as to permit them, without Federal interference, to seek au-

thority from State legislatures, commissions, or other appropriate agencies for the proposed increase in fares.

In the only decision construing the present order of which the defendants are aware, it was held and, we submit, convincingly demonstrated that the instant order does *not* relieve the railroads of the necessity of procuring State approval for the proposed increase in rates; but that its only effect, even if it is valid, is to express Federal consent to the increase.

The case to which defendants refer is *Transit Commission* v. *Long Island R. Co.*, decided by the Supreme Court of New York (Hofstadter, J.) on March 6, 1942. This opinion has not yet been officially reported but is available through Commerce Clearing House upon request, and is reproduced in full as Appendix D to this statement.

In that case the Transit Commission and the City of New York sued to restrain the defendant railroad companies from putting into effect the increased schedule of intrastate passenger rates contemplated by the order involved in this case. It was admitted that the railroads had not procured State authorization for the increase in rates; but the defendant railroads contended there, as the plaintiff contends here, that the Interstate Commerce Commission had established the increased schedule of rates and had thereby superseded previous tariffs.

The opinion is carefully reasoned and very well expressed. The court recognized, as do the defendants in the present case, that there is no question that the Interstate Commerce Commission has the authority to raise intrastate rates in order to protect interstate commerce. But the court reached the conclusion that the Commission *did not intend to exercise that authority*, but on the contrary, the sole purpose of the order was to withdraw Federal opposition to the increase, if the States acceded to requests for such increase.

The substance and import of the argument leading to this conclusion may be thus briefly indicated:

It is, of course, axiomatic that the states are free to control commerce unless and until the federal sovereign, either through congressional enactment or administrative regulation, actually exercises its supreme power over "commerce among the several states." (*C. R. I. & P. Ry. Co.* v. *Arkansas*, 219 U. S. 453; *Atlantic Coast Line R. Co.* v. *Georgia*, 234 U. S. 280; *Robbins* v. *Shelby County Taxing District*, 120 U. S. 498.)

It is to be supposed that if the government of the United States desires to enforce upon the states, the public and the carriers a vast and comprehensive program of rate or other regulation, it will do so in unmistakable terms.

Not only does the present order fail to use language explicitly and unequivocally expressing an intent to accomplish so important and far-reaching a result as the abrogation of all intrastate rates therefore existing, but the wording of the order, although doubtless ambiguous, is pregnant with the implication of a contrary intent.

The New York court said:

> "The order of January 21, 1942, contains this provision: 'It is further ordered, that all outstanding orders, as amended, of the Commission, authorizing or prescribing interstate and *intrastate fares*, or bases of fares be, and they are hereby modified; effective concurrently with the establishment of the increased fares herein approved, only to the extent necessary to permit the increase herein authorized, to be added to the interstate and intrastate fares approved or prescribed in, or maintained or held by virtue of said outstanding orders.
>
> . . . . . .
>
> "This provision, standing altogether by itself, would lend strong support to the claim of the respondents

that the Interstate Commerce Commission had intended to increase intrastate rates. Why amend orders dealing with intrastate rates if there was no intention to deal with them? But the provision quoted must be read in the light of the entire order, its preambles as well as its directing provisions. Thus read, it becomes clear that the purpose of the quoted section of the order is merely to render possible action by the state regulatory bodies, to approve similar increases in intrastate rates. In its first preamble the order refers to the fact 'that proper authorities of all states have been notified of this proceeding and *similar* application has been or *will be* made to the regulatory of the respective states for *permission* to increase *similarly* petitioners' *intrastate* rate fares and charges.' In the light of this recitation, it is obvious that in this aspect no more was intended by the order than to lift any restrictions that might exist barring applications to state regulatory bodies for permission to increase intrastate rates." (Emphasis of the court.)

In approaching the conclusion above expressed, the court considered the findings not merely inadequate to support the order as a valid interference with rates fixed by state commissions, but as evincing an intent *not* to supersede state regulations and as showing, on the contrary, no purpose other than to approve the new rates so far as federal authority was concerned and to sanction alteration of existing rates by state bodies. The court said:

"The power of the Interstate Commerce Commission in the premises, thus, cannot be brought in question; nor have the petitioners sought to do so. But the power of the Interstate Commerce Commission to regulate intrastate rates depends upon a finding by it that there exists an unfair discrimination against interstate commerce; and this determination must be based on evidence conforming to a high standard of certainty (*Chicago & Northwestern Railway Co.* v. *Rockwell Lime Co.*, 373 Ill. 309, cert. den. 311 U. S. 660). In

determining whether the orders of the commission relied upon by the respondents actually purport to fix intrastate rates, it is appropriate to bear this rule in mind."

* * * * * * *

"It is undoubtedly true, as was pointed out by the Supreme Court of the United States in *Railroad Commission of Wisconsin* v. *Chicago, B. & Q. R. R.* (257 U. S. 563), that if the railroads are to earn a fixed net percentage of income, the lower the intrastate rates, the higher the interstate rates may have to be, and that the Transportation Act of 1920 may be said to have adopted the policy that the effective operation of the act 'will reasonably and justly require that intrastate traffic should pay a fair proportion of the cost of maintaining an adequate railway system' (*supra*, p. 588). But this is far from saying that the intrastate rates and the interstate rates must be on a parity. The problem of determining what is a fair proportion of the burden that should be borne by intrastate traffic is one which the Interstate Commerce Commission is required to deal with, and its decisions must be based on findings that low rates for intrastate commerce would constitute an unfair burden on interstate commerce."

In other words, the New York court did not, upon a consideration of the findings, regard them as merely insufficient to support an order installing a new rate structure. On the contrary, the court's reading of the findings convinced it that *it was not even the intent* of the Commission to attempt such a comprehensive and far-reaching revision of the rate structure of the country.

Let us observe the terms of the order itself.

The first paragraph immediately following the recitals merely provides that

"the increased passenger fares as provided by the said petitioners be and they hereby are approved,"

the remainder of the paragraph being concerned entirely with provisions where the fare results in a fraction of a cent, or an odd number of cents, where the fares are more than a dollar.

The second paragraph provides that

> "All outstanding orders as amended of the Commission authorizing *or prescribing* interstate and intrastate fares or bases of fares be and they are hereby modified * * * only to the extent necessary to *permit* the increase herein authorized."

Thus the Commission authorizes that rates *prescribed* be modified so as to *permit* the increase in charges.

The remaining three paragraphs of the order merely require tariffs or supplements to refer to the order, provide that increased fares may be made effective upon not less than ten days' notice to the Commission and the public, and retain jurisdiction

> "for the purpose of determining, if need be, the lawfulness of any particular fare or fares resulting from this order."

Surely the Interstate Commerce Commission, conscious of the very powerful influence upon the national economy which would necessarily result from a flat ten per cent increase upon railroad fares throughout the nation, if it intended to command such an increase, would use language unambiguous in meaning and imperative in mood to accomplish its result. It would certainly preface such language with the detailed and specific findings inexorably required by due process of law and the repeated admonitions of this Court.

The defendants, therefore, contend that it was not the purpose and is not the effect of the order to impose upon the country a mandatory increase in rates. On the contrary, as the Supreme Court of New York has already observed, the import of the order must be determined by the tenor

of the language; and the language does no more than grant the sufferance of the Commission to an increase in rates, provided that the states in turn permit such an increase.

Concluding Observations.

The authority of the Interstate Commerce Commission over the rates of public carriers, both among the several states and within the confines of those states, bestows upon it vast power over the resources of the nation. Such power is granted to it only because public necessity imperatively so requires. But with the necessity for power goes the utmost necessity for the observance of constitutional principles. Unless the precepts defining due process of law are scrupulously attended to, the primary purpose of that power, which is a just and orderly superintendence over the affairs of the nation, will be frustrated.

If it was indeed the intent of the Commission to visit upon the nation a blanket ten per cent increase in the cost of transportation, the Commission should have found, at least in terms of estimates and approximations, a factual basis for that increase. It should have at least appraised, if it could not positively compute, in reasonably concrete terms the factors of increased cost and wages, and have found their proper relation to revenue resulting from the great press of increased business. In short, the Commission should have obeyed the principles laid down in the cases cited and should have made findings in conformity with those principles. It should then have made its order in unmistakable terms.

But the defendants contend that it was not the purpose of the order in the present case to make mandatory the increase in rates. When the order is construed merely as permitting the railroads to petition the State for an increase

of fares, then the findings, although doubtless subject to criticism, might be sufficient to support an order merely permissive in intent; and the order may be given effect, according to its terms.

The defendants therefore contend that the order should be construed as merely permissive; but that if it is interpreted as mandatory, then it is invalid.

In view of the foregoing observations, it is respectfully submitted that the questions involved on this appeal are substantial, within the meaning of paragraph 1 of Rule 12 of this Court as amended on April 6, 1942 (314 U. S.), and that the case should be considered fully by this Court at its October, 1942, term.

(F) Cases Believed to Sustain the Jurisdiction.

The following decisions of this Court are believed to sustain the jurisdiction of the Supreme Court of the United States on a direct appeal to review the final order, judgment or decree here in question:

Oklahoma Natural Gas Co. v. *Russell*, 261 U. S. 290;

Stratton v. *St. Louis & Southwestern R. Co.*, 282 U. S. 10;

Smith v. *Illinois Bell Telephone Co.*, 282 U. S. 133;

Lindheimer v. *Illinois Bell Telephone Co.*, 292 U. S. 151;

West v. *Chesapeake & Potomac Telephone Co.*, 295 U. S. 662;

Railroad Commission v. *Pacific Gas & Electric Co.*, 302 U. S. 388.

(G) Statement Respecting Opinions.

The court below delivered no written opinion or discussion of the case, but did make certain findings of fact and conclusions of law in connection with the entry of the

decree in question. Copies of these findings and conclusions, and of the final decree herein, are reproduced as Appendices A and B, and attached to this jurisdictional statement.

Respectfully submitted,

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Of Counsel.

APPENDIX A.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

No. 4020.

CHARLES M. THOMSON, As Trustee of the Property of Chicago and North Western Railway Company, a Corporation, *Plaintiff*,

vs.

ILLINOIS COMMERCE COMMISSION, et al., *Defendants*.

Findings of Fact and Conclusions of Law.

This cause having come on for final hearing before this Court the 17th day of April, 1942, upon defendants' motion to strike the complaint and dismiss the cause and upon the prayer of the complaint for a perpetual injunction; and

The defendants having filed no answer and having elected to stand upon their motion; and

The Court having heard and considered the cause upon the sworn complaint and the supporting evidence heretofore received at the hearing upon plaintiff's motion for interlocutory injunction and upon the briefs and arguments of counsel and certain reports and orders of the Interstate Commerce Commission submitted therewith, of which this Court takes judicial notice, and being fully advised in the premises, makes the following findings of fact and conclusions of law:

Findings of Fact.

1. The Court has jurisdiction of this cause under Sections 24(8), 24(1), and 266 of the Judicial Code.

2. All parties defendant have been duly served with copies of the complaint, temporary restraining order, bond, and plaintiff's motion for interlocutory injunction, and were represented by counsel at the preliminary hearing herein on March 20, 1942, and at this final hearing.

3. Up to and including March 7, 1942, plaintiff and his predecessor in interest, the Chicago and North Western Railway Company, had been collecting fares for the transportation of intrastate passengers in commutation service in Illinois rates, fares and charges pursuant to requirements of a supplemental report and order of the Interstate Commerce Commission entered upon appropriate findings of value, preference and prejudice and unjust discrimination against interstate commerce under date of October 6, 1925, in a proceeding entitled "In the Matter of Intrastate Fares Within the State of Illinois," Docket No. 11703, 102 I. C. C. 479, a copy of which is attached to the complaint herein as Exhibit A. On October 23, 1925, an interlocutory injunction was entered in the District Court of the United States for the Northern District of Illinois, Eastern Division, by a specially constituted court of three judges, wherein the persons who were then members of the Illinois Commerce Commission, the Governor, Attorney General, and other State officials were enjoined from in any way interfering with the collection of the fares and charges authorized by said order and required by said order and set forth in tariff schedules on file with the Interstate Commerce Commission.

4. The said supplemental report and order, Exhibit A, were issued by the Interstate Commerce Commission following and in connection with a nationwide investigation of freight and passenger rates and charges in effect throughout the United States, following the close of the First World War. The purpose and effect of said order of October 6, 1925, was to require the Chicago and North Western Railway Company to increase its passenger fares with respect to intrastate commutation travel within the State of Illinois to substantially the same level as then existed with respect to interstate passenger traffic, which had previously been increased by it pursuant to order and authority of the Interstate Commerce Commission, and thus to remove undue preference and prejudice, and unjust discrimination against interstate commerce, as well as undue preference and advantage to persons traveling in intrastate commerce on its railroad lines within the State of Illinois, as more particularly set forth in Exhibit A.

The said order of the Interstate Commerce Commission was of a continuing nature and expressly provided that it should remain in force until further order of that Commission.

5. On February 28, 1936, in a proceeding known as Docket No. 26550, Passenger Fares and Surcharges (214 I. C. C. 174), the Interstate Commerce Commission, in a further general and nation-wide investigation of railroad passenger fares, entered an order which, by specific reference to its above-mentioned previous order in Docket No. 11703, retained its continuing jurisdiction over the Illinois intrastate commutation passenger fares here involved, although the effect thereof was not to require any modification of said fares.

6. In December, 1941, pursuant to a petition filed on behalf of virtually all of the railroads in the United States, the Interstate Commerce Commission undertook a further nationwide general investigation of both freight rates and passenger fares to determine whether or not increases of ten per cent therein should be authorized, as requested by the railroads, in order to assist them in meeting increased operating expenses then being incurred on account of (a) increased wages to employes, (b) increased cost of materials and supplies, and (c) additional expenditures to safeguard their properties and operations during the war emergency. By its order entered under date of January 21, 1942, in said proceeding known as Ex Parte No. 148, Increased Railway Rates, Fares, and Charges, 1942, which is a valid and lawful order, the Interstate Commerce Commission authorized the railroads, including the plaintiff herein, to increase their passenger rates, fares, and charges ten per cent, as appears in Exhibit B, made a part of the complaint, upon findings that said increase is necessary to enable the railroads to continue to render adequate and efficient railway transportation service during the present emergency, and that said increased fares are reasonable and lawful.

7. In its report in Ex Parte No. 148 entered under date of March 2, 1942, the Commission renewed and affirmed

the aforesaid findings, and found in addition that wage increases and other increased costs had imposed upon the carriers increased operating expenses upward of $360,000,000 annually; that increased passenger fares and freight rates were requested to enable the carriers to meet these increased expenses and insure their ability to render adequate transportation service during the current war emergency; that these increased expenses were general in character and applied to all classes of traffic; that the only practical method of providing the necessary increased revenues was to grant authority for a general increase in all rates and fares; that the passenger traffic justly and reasonably should bear a part of the proposed increase; that a ten per cent increase in passenger fares would produce upwards of $45,000,000 in additional revenue which, in connection with the increased freight rates allowed would be just and reasonable. The order of January 21, 1942, further provided that all outstanding orders, as amended, of the Commission, authorizing or prescribing interstate and intrastate fares, or bases of fares, were thereby modified, effective concurrently with the establishment of the increased fares therein approved, only to the extent necessary to permit the increase therein authorized to be added to the interstate and intrastate fares approved, prescribed in, or maintained or held by virtue of, said outstanding orders; and further, that all tariffs or supplements changing fares by authority of said order, which are maintained or held by authority of outstanding orders of the Commission, should bear on their title pages specific reference to that order. By reference to outstanding orders previously issued in proceedings under Section 13 of the Interstate Commerce Act and reference to the outstanding order in said Docket No. 11703, this order was made applicable, specifically, to the Illinois intrastate commutation passenger fares involved in this suit.

8. On or about February 6, 1942, plaintiff proceeded to file with the Interstate Commerce Commission and the Illinois Commerce Commission tariff schedules giving reference to the aforesaid order of the Interstate Commerce Commission entered on January 21, 1942, the effect of

which was to modify the said previously existing Illinois intrastate commutation and passenger fares by increasing them ten per cent effective March 8, 1942.

9. On or about February 18, 1942, the defendant Illinois Commerce Commission issued a so-called suspension order (Exhibit C attached to the complaint herein), by the terms of which it undertook to suspend to July 6, 1942, the said tariffs and increased fares named therein, and ordered the plaintiff not to file any subsequent tariff or otherwise to change said previously existing fares during such period of suspension or any extension thereof unless specially authorized by said Illinois Commerce Commission.

10. The said tariffs so filed by the plaintiff became effective March 8, 1942, and the increased fares therein named upon and since that date up to the present time are the lawful existing fares, and plaintiff is entitled and required to collect and continue collecting same.

11. The purport and effect of said Illinois Commerce Commission order of February 18, 1942 is to prescribe for plaintiff intrastate passenger fares upon the four classes of tickets above mentioned, as such fares existed on February 18, 1942, and to prohibit plaintiff from increasing or modifying same unless and until permitted to do so by further order of that Commission at some indefinite time in the future.

12. The said fares so purported to be fixed and prescribed by the Illinois Commerce Commission are noncompensatory in that they do not produce sufficient revenue for the plaintiff to meet the expenses of rendering the service of transporting intrastate passengers upon said tickets within the Chicago suburban area in the State of Illinois. The business of transporting such passengers within said area is now being conducted, and for some years has been conducted, by the plaintiff at a loss and without deriving any return whatsoever upon the value of the property of the plaintiff devoted to the rendering of such service.

13. The increased rates above mentioned will not be sufficient to overcome the loss being realized by plaintiff from the

transportation of intrastate passengers upon the four classes of commutation tickets above mentioned within said area in Illinois, and with the application and collection of said increased fares plaintiff is still realizing a loss therefrom and is deriving no return whatsoever upon the investment in the property used in and devoted to the rendering of such transportation service. Some of said increased fares are at rates in excess of two cents per mile and hence within the prohibition of the Illinois two-cent fare law.

14. After the entry of said suspension order, defendants took and have since maintained the position that said order in Ex Parte No. 148 was void and of no force or effect to authorize the establishment and collection of said increased fares, and that the said suspension order of the Illinois Commerce Commission is a valid and enforceable order and plaintiff, by collecting and continuing to collect said increased fares, is subject to the imposition of the heavy fines and penalties provided in the Illinois Statutes for violations by public utilities of the provisions of the Illinois Public Utilities Act and orders of the Illinois Commerce Commission and the Illinois Two-Cent Fare law.

15. In support of the position thus taken by defendants, they have threatened and continue to threaten the plaintiff with the commencement and prosecution of numerous actions in the State courts of Illinois for the imposition upon him and his agents of the said fines and penalties if he or they continue to collect the aforesaid increased fares.

16. Unless this Court grants at this time perpetual injunction as prayed for in the complaint herein, the plaintiff and his agents will be subject to imminent liability for prosecution and possible arrest because of the threatened day-to-day accumulation of heavy penalties under the aforesaid State Statutes, and will be liable to be interfered with in the collection of said lawful fares by virtue of the said threatened action of the defendants, and plaintiff will thereby be subjected to immediate and irreparable loss of passenger revenues rightfully due him, thereby being deprived of his property without due process of law.

Conclusions of Law.

1. The said order of the Interstate Commerce Commission of January 21, 1942 is a valid order and it authorizes the ten per cent increase in fares as set forth in the aforesaid tariffs filed by the plaintiff and effective March 8, 1942.

2. The said order of January 21, 1942 expressly modified the previous order of the Interstate Commerce Commission entered in 1925 (Exhibit A attached to the complaint herein), by which the Interstate Commerce Commission had taken jurisdiction over the passenger fares involved in this suit, which jurisdiction it had thereafter retained. By virtue of its orders referred to in the foregoing findings, the Interstate Commerce Commission asserted and exercised its paramount and exclusive authority in the regulation of the passenger fares here involved, leaving the Illinois Commerce Commission without power to act with respect thereto.

3. The passenger fares established by the said tariffs which became effective March 8, 1942, are the lawful existing passenger fares which plaintiff is entitled to collect and retain.

4. The Illinois Commerce Commission's order of February 18, 1942 (Exhibit C attached to the complaint herein) is void and of no force or effect whatever with respect to the fares and charges for the four classes of tickets above mentioned.

5. The rates which said Illinois Commerce Commission order would require plaintiff to observe and collect with respect to the four classes of commutation tickets for intrastate passenger travel, involved in this suit, would be noncompensatory and confiscatory. Enforcement of said order would deprive plaintiff of his property without due process of law, in violation of Amendment XIV of the Constitution of the United States.

6. Defendants' motion to strike and to dismiss should be denied.

7. Plaintiff is entitled to a perpetual injunction as prayed for in the complaint herein and a decree of injunction will issue accordingly at this time.

SHERMAN MINTON,
Circuit Judge.
WILLIAM H. HOLLY,
District Judge.
PHILIP L. SULLIVAN,
District Judge.

April 28, 1942.

APPENDIX B.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

No. 4020.

CHARLES M. THOMSON, as Trustee of the Property of Chicago and North Western Railway Company, a Corporation, Plaintiff,

vs.

ILLINOIS COMMERCE COMMISSION, et al., Defendants

ORDER DENYING DEFENDANTS' MOTION TO DISMISS AND GRANTING PERMANENT INJUNCTION.

This cause having come on for final hearing before this Court this 17th day of April, 1942, upon defendants' motion to strike the complaint and dismiss the cause and upon the prayer of the complaint for a permanent injunction; and

The Court having heard and considered the arguments of counsel and being fully advised in the premises, and having made and entered herein its findings of fact and conclusions of law;

It is Therefore Ordered, That the defendants' motion to strike the complaint and dismiss the cause be and it is hereby denied; and

For the reasons that the order of the Interstate Commerce Commission of January 21, 1942, referred to in said findings, has authorized plaintiff to establish and collect the increased passenger fares involved in this suit, and the order of the Illinois Commerce Commission which would prevent him from establishing and collecting same is void and the fares which he would be required to collect pursuant to said last-mentioned order would be confiscatory of his property, all as more particularly set forth in the findings and conclusions this day entered herein by the Court;

It is Further Ordered, That the defendants Illinois Commerce Commission, and John D. Biggs, William Parrillo, Frank Peska, Edwin A. Rosenstone, and Val J. Washington, individually and as members of and constituting the Illinois Commerce Commission; Dwight H. Green, individually and as Governor of the State of Illinois; George F. Barrett, individually and as Attorney General of the State of Illinois; Thomas J. Courtney, individually and as State's Attorney of Cook County, Illinois; Harry A. Hall, individually and as State's Attorney of Lake County, Illinois; Lee E. Danies, individually and as State's Attorney of DuPage County, Illinois; Charles G. Seidel, individually and as State's Attorney of Kane County, Illinois; and William M. Carroll, individually and as State's Attorney of McHenry County, Illinois, and each of them, their servants, agents, employes, attorneys and all persons in active concert or participation with the defendants or any of them be, and they hereby are, restrained and enjoined, perpetually, from commencing any action or actions or instituting any legal proceeding for the collection of any fines or penalties against the plaintiff or his agents on account of the filing by them of tariffs (effective March 8, 1942) with the Interstate Commerce Commission providing for the collection of increased rates, fares and charges for 10-ride bearer, 25-ride bearer, 25-ride individual, and 60-ride monthly individual tickets for use in intrastate commutation passenger travel over lines of the Chicago and North Western Railway Company in the State of Illinois, said tariffs having been filed on or about February 6, 1942 with each the Illinois Commerce Commission and

the Interstate Commerce Commission, and amendments to said tariffs likewise filed on or about March 6, 1942 which withdrew from said first-named tariffs certain rates, fares and charges named therein other than those respecting the four classes of tickets above described; or on account of any alleged violation of a certain order issued by the Illinois Commerce Commission under date of February 18, 1942 purporting to suspend the rates, fares and charges set forth in said tariffs as to the four classes of tickets described; and from arresting plaintiff or any of his agents or attempting to secure the conviction or imprisonment of plaintiff or any of his agents on account of any of the foregoing acts; and from preventing or hindering plaintiff and his agents from charging and collecting the increased rates, fares and charges so established by said tariffs as amended, effective March 8, 1942; and from molesting or interfering with plaintiff or his agents in any respect whatsoever as to their collection of the said increased rates, fares and charges.

Dated April 28, 1942.

By the Court,

SHERMAN MINTON,
Circuit Judge.
WILLIAM H. HOLLY,
District Judge.
PHILIP L. SULLIVAN,
District Judge.

APPENDIX C.

Passenger Fares and Passenger-Train Services

As stated, no increase is sought in the fares for members of the armed forces traveling on furlough, or in the extra fares applicable on particular trains. The latter fares are excepted for the reason that the services for which they are charged are not directly affected by the recent wage increases. No authority is sought to make effective any increases in the charges for accessorial or allied passenger-train services, such as handling baggage or excess baggage, switching loaded or empty passenger or baggage cars,

moving special trains, parking passenger or baggage-car equipment, transporting passenger automobiles, motion picture films, newspapers and periodicals, invalid chairs, and burial cases, and transferring passengers between stations in the same city.

The history of the passenger fares, traffic, and revenues of the railroads in the last several decades may be found in *Passenger Fares and Surcharges*, 214 I. C. C. 174, and *Eastern Passenger Fares in Coaches*, 237 I. C. C. 271, and will not be restated. The basic fares generally in effect throughout the country when the petition was filed were: In sleeping and parlor cars, one way, 3 cents per mile; round trip, in the East, except locally in New England, a descending scale from 3 cents per mile for the shorter hauls to 90 per cent of 3 cents at 900 miles; in the South, 30-day tickets, 2.25 cents, 6-month tickets 2.75 cents; in coaches, one way, 2 cents per mile in the East and West, and 1.5 cents in the South; round trip, in the East, except locally in New England, a descending scale from 2 cents for the shorter hauls to 1.5 cents at 533 miles, 1.8 cents in the West; and 1.35 cents in the South.

The average revenue per passenger-mile on the class I railroads for 1940 was 2.3 cents in sleeping and parlor cars and 1.51 cents in coaches. On all passenger traffic in the year ended September 30, 1941, the average was 1.754 cents, the lowest rate per mile in railroad history. The average increase per mile proposed is thus not more than 2.3 mills in sleeping and parlor cars, 1.51 mills in coaches, and 1.754 mills on all passenger traffic. In the year ended September 30, 1941, the total passenger revenue was $483,568,775, which was 33.6 per cent less than in 1930, but the number of passenger-miles was 2.82 per cent greater and the average-mile revenue 35.4 per cent less than in 1930.

Petitioners express confidence that the increase proposed will not curtail the travel volume, which they estimate will not be less in 1942 than it was in 1941. Business and economic conditions are more favorable for rail travel than in 1936 when the present maximum basis of 3 cents in sleeping and parlor cars and 2 cents in coaches was prescribed by us. An important contributing factor is the

recent curtailment of automobile production and a scarcity of rubber tires for automobiles.

The only protestants against the proposed fare increase are a representative of the State of South Dakota, and an individual who is a frequent passenger, who appeared in his own behalf. The former based his opposition upon the belief that increased fares would discourage travel by rail and would not result in increased revenue to the carriers. The latter, for many years a student of transportation economics, presented data to show that since 1920, when the last general increase in passenger fares throughout the country became effective, increased fares usually resulted in reduced revenues, and reduced fares in increased revenues. He is convinced that the increase now sought will have the same effect.

Because of the abnormal conditions which now prevail throughout the country we are of the opinion that the increased fares proposed will yield substantial amounts of additional revenues, and that the passenger service justly and reasonably should contribute to meeting the added operating costs of the railroads.

In an appropriate order made in this proceeding on January 21, 1942, we found that the increase in fares proposed is necessary to enable the petitioners to continue to render adequate and efficient railway transportation service during the present emergency, and that the proposed increased fares will be reasonable and lawful. We therein approved the proposed increased fares subject to a suitable rule for the disposition of fractions stated in the order.[2]

All our outstanding orders, as amended, authorizing or prescribing interstate and intrastate fares, or bases of fares, were modified by that order, effective concurrently with the establishment of the increased fares therein ap-

[2] The rule of fractions provided that when the total increased fares are less than $1, fractions of less than 0.5 cent shall be dropped and fractions of 0.5 cent or greater may be increased to the next whole cent, and that when the total increased fares are more than $1, such fares shall end in 0 or 5, but that no more than 2.5 cents shall be added to the present fares as increased by 10 per cent in order to make such total fares end in 0 or 5.

proved, to the extent necessary to permit the authorized increase to be added to the interstate and intrastate fares approved or prescribed in, or maintained or held by virtue of, such outstanding orders. We retained jurisdiction for the purpose of determining, if need be, the lawfulness of any particular fare or fares resulting from that order. Increased fares were filed and became effective February 10, 1942.

The foregoing findings as made in our order of January 21, 1942, are here renewed and affirmed.

As pointed out, the petitions of the carriers do not seek to increase the charges for accessorial or allied passenger-train services, certain of which we have named above. Accordingly, the authority granted in our order of January 21, 1942, above referred to, including permission therein to publish and file the increased fares on 10 days' notice, made no reference to charges for such service. Nevertheless, many of the tariffs filed under the purported authority of that order also included increased charges for the accessorial or allied services in addition to increased passenger fares. We have suspended the effective date and entered an order of investigation as to such increased charges. The matter is now pending.

An increase of 10 per cent is proposed in the rates and charges on milk and cream, and articles grouped therewith, as published in passenger tariffs. Usually these commodities are carried on passenger trains. This rate proposal will be considered later herein. No specific evidence in support of the proposal as to milk and cream was offered by petitioners.

APPENDIX D.

Full text of the opinion in the case of *Transit Commission*, being the Metropolitan Division of the Department of Public Service, petitioner, and *The City of New York*, intervenor-petitioner, vs. *The Long Island Railroad Company, The Staten Island Rapid Transit Railway Company* and *The New York Central Railroad Company*, respondents.

SUPREME COURT, NEW YORK COUNTY, TRIAL TERM, PART IX.

Commerce—Interstate and Intrastate Railroad Rates—Effect of Order of Interstate Commerce Commission.

The order of the Interstate Commerce Commission, made January 21, 1942, for an increase of interstate rates of railroads, does not direct a similar increase of intrastate rates nor is such a direction to be inferred from its provisions or from earlier orders of the Commission. A state court, though it has no power to set aside an order of the Commission, has jurisdiction to determine whether an order justifies an increase in intrastate rates. Such increase not being justified by the order, and authority therefor not having been obtained from the state regulatory body, a temporary injunction against an increase of intrastate rates should be made permanent. Doubts remaining which may be removed by further clarifying orders of the Commission, the decree should provide that either party may apply for a modification or vacating thereof on the presentation of such further orders.

Transit Commission, being the Metropolitan Division of the Department of Public Service, petitioner, and *The City of New York*, intervenor-petitioner, vs. *The Long Island Railroad Company*, *The Staten Island Rapid Transit Railway Company* and *The New York Central Railroad Company*, respondents.

Decided March 6, 1942.

George H. Stover, by Philip Hodes; John J. Bennett, Jr., by H. F. R. Mulligan; William C. Chanler, by Herman Horowitz, for petitioners.

Louis J. Carruthers for Long Island Railroad Company; Cravath, DeGersdorff, Swaine & Wood, by Jesse C. Millard, for Staten Island Railroad Company; Clive C. Handy, by T. P. Healy, for New York Central Railroad Company; Martin Conboy, of counsel for all respondents.

HOFSTADTER, J.—This is a special proceeding commenced by the Transit Commission, as petitioner, and the City of

New York, as intervening-petitioner, against The Long Island Railroad Company, The Staten Island Rapid Transit Railway Company and The New York Central Railroad Company, as respondents. The Attorney-General of the State of New York has appeared under section 62 of the Executive Law. The petition alleges that the respondents have not complied with section 29 of the Public Service Law, which prohibits any change in rates without the prior approval of the state regulatory body. It has been conceded that such approval has not been obtained and that section 29 has not been complied with. The petitioners invoke the provisions of section 57 of the Public Service Law of the State of New York, which authorizes a proceeding in such case, and seek an injunction to restrain the respondents from carrying out their expressed purpose of raising by 10 per cent, passenger rates charged by them in intrastate traffic.

The respondents contend, however, that an order of the Interstate Commerce Commission, promulgated on the 21st day of January, 1942, permitting an increase of rates of 10 per cent on the part of the petitioning Class I railroads applies to the intrastate as well as to interstate rates of the respondents; and that as a result of this order, the respondents are obliged to increase their intrastate rates so as to make them accord with the authorized interstate rates without the necessity for further recourse to the Transit Commission. It is further argued that this court is without jurisdiction to pass upon the problems presented, inasmuch as exclusive right to deal with orders of the Interstate Commerce Commission of this character has been conferred by Congress upon the federal district courts (Judicial Code, sec. 208, 28 U. S. C. sec. 46).

There can be no question that if this proceeding involves to any extent an effort to "enjoin, set aside, annul or suspend any order of the Interstate Commerce Commission" (sec. 46, *supra*), the only forum in which it might be heard in the first instance is the District Court of the United States. But, the respondents' contention that only the United States courts have jurisdiction after the I. C. C. has made a determination (28 U. S. C. A., sec. 46) depends upon the prior finding of fact that the order of the I. C. C. actually

did affect intrastate rates in this state" (Mr. Justice Rosenman, on the application for a temporary injunction, 107 N. Y. L. J., 647, February 11, 1942). Likewise, the refusal by Mr. Justice Eder to grant the application for removal to the federal court recognized that as a preliminary to invoking section 46 of the Judicial Code, it was necessary to determine whether an order of the Interstate Commerce Commission is being reviewed, or if, on the other hand, a statute of this state is sought to be enforced.

Indeed, the Supreme Court of the United States has indicated that suit to enjoin the increase of intrastate rates on the ground that the increase is prohibited by state laws may be maintained in the state courts even when it is claimed in the answer that an order of the Interstate Commerce Commission requires the increase in question (*American Express Co.* v. *South Dakota ex rel. Caldwell*, 244 U. S. 617-628). In upholding the jurisdiction of the state court the court said: "If this were a proceeding professedly 'to enjoin, set aside, annul, or suspend' an order of the Commission 'in whole or in part,' a state court would obviously have no jurisdiction. The bill does not purport to attack, nor does it even refer to any such order. It alleges only that the express companies propose 'increases and advances' in charges for intrastate transportation, by introducing 'existing interstate rates.' It is the answer which sets up the order of the Commission as a justification; and plaintiffs deny that it is such."

The argument of the respondents comes to this: That as a result of the history of the rate regulation of these respondents by the Interstate Commerce Commission, these respondents are required, under relevant orders of that commission, to maintain their intrastate rates at the same level as the rates fixed by the commission for interstate commerce; and that, in any event, reading the order of the commission of January 21, 1942, in the context of the history of the rate regulation of these respondents, it is plain that the respondents are required to increase their rates on intrastate traffic by ten per cent. If this position were sound it would follow that this court is without jurisdiction to deal with the matter and that the injunction must be denied. On

the other hand, if an examination of the relevant matters manifest that there is no obligation on the respondents, by virtue of any order or orders of the Interstate Commerce Commission, to increase the respondents' intrastate rates at the present time, their power and right to do so would necessarily depend upon their first obtaining the approval of the state regulatory bodies (Public Service Law, sec. 29); and since, concededly, no such approval has in fact been obtained, it would follow that the injunction requested must issue.

Ever since the Shreveport case (234 U. S. 342), it has not been open to doubt that Congress has the power to authorize the Interstate Commerce Commission to fix intrastate rates where such action is necessary to prevent interference with interstate commerce. In 1920, by a general amendment to the Interstate Commerce Act, Congress specifically authorized the Interstate Commerce Commission to fix intrastate rates whenever the commission after full hearings, "finds that any such rate, fare, charge, classification, regulation or practice causes any undue or unreasonable advantage, preference or prejudice as between persons or localities in intrastate commerce, on the one hand, and interstate or foreign commerce on the other hand, or any undue, unreasonable or unjust discrimination against interstate or foreign commerce" (49 U. S. C. A., sec. 13, 141).

The power of the Interstate Commerce Commission in the premises, thus, cannot be brought in question; nor have the petitioners sought to do so. But the power of the Interstate Commerce Commission to regulate intrastate rates depends upon a finding by it that there exists an unfair discrimination against interstate commerce; and this determination must be based on evidence conforming to a high standard of certainty (*Chicago & North Western Railway Co.* v. *Rockwell Lime Co.*, 373 Ill. 309, cert. den., 311 U. S. 660). In determining whether here, the orders of the commission relied upon by the respondents, actually purport to fix intrastate rates, it is appropriate to bear this rule in mind.

This history of the rate regulation of these respondents by the Interstate Commerce Commission since the Interstate Commerce Act of 1920 may be briefly recounted. On

July 29, 1920, by an order—pursuant to section 15 (a) of the act, in a proceeding entitled *Ex Parte* 74 (58 I. C. C. 220)—the commission authorized a general increase in interstate passenger fares by 20 per cent. The New York State rate regulatory authority declined, however, to permit an increase of intrastate rates to conform with the increased interstate rate. A proceeding, initiated by the railroads before the Interstate Commerce Commission pursuant to section 13, subdivisions 3 and 4 of the Interstate Commerce Act, resulted in the determination by the commission that the maintenance of the lower rate in intrastate commerce by the State of New York was an unfair discrimination against interstate commerce; and by order dated November 13, 1920, the respondents, among others, were directed to "cease and desist" from continuing the lower rate in intrastate commerce on the ground that such conduct would constitute unjust discrimination against interstate commerce. Though that order explicitly prevented the respondents from maintaining a lower rate in intrastate commerce than that directed for them in interstate commerce, nothing that has been called to my attention justifies the conclusion that either the report of the Interstate Commerce Commission in that proceeding or the order based upon it, established the general principle that intrastate rates must always conform with interstate rates. Indeed, it is exceedingly doubtful whether the commission has power to adopt such a principle of construction and thus dispense with the need for a specific finding in each case that the maintenance of a lower intrastate rate unjustly discriminates against interstate commerce.

It is undoubtedly true as was pointed out by the Supreme Court of the United States in *Railroad Commission of Wisconsin* v. *Chicago B. & Q. R. R.* (257 U. S. 563), that if the railroads are to earn a fixed net percentage of income, the lower the intrastate rates, the higher the interstate rates may have been, and that the Transportation Act of 1920 may be said to have adopted the policy that the effective operation of the act "will reasonably and justly require that intrastate traffic should pay a fair proportion of the cost of maintaining an adequate railway system." (*supra*, p. 588). But this is far from saying that the intrastate

rates and the interstate rates must be on a parity. The problem of determining what is a fair proportion of the burden that should be borne by intrastate traffic is one which the Interstate Commerce Commission is required to deal with, and its decisions must be based on findings that low rates for intrastate commerce would constitute an unfair burden on interstate commerce.

In 1936, the commission amended its order by requiring a reduction in rates in interstate commerce (214 I. C. C., 174). The order, Exhibit 1, specifically provided that in interstate commerce, rates be reduced to 2 cents per passenger mile in coaches and to 3 cents per passenger mile in Pullman trains. The report of the commission, Exhibit H, upon which the order was based, does not discuss the problem of the relation between intrastate rates to interstate rates, nor does it determine that intrastate rates should be lowered as the result of this order. Indeed, it was assumed by at least one of the respondents here that the order of the Interstate Commerce Commission did not affect its right to maintain the higher rate and it was only after the petitioner initiated proceedings under Section 57 (a) of the Railroad Law that the order of the courts of this State was obtained directing the respondent Long Island Railroad Company to reduce its rates to the level of the interstate railroad rates (*Transit Commission* v. *Long Island Railroad Co.*, 272 N. Y. 27).

Except for intermittent changes during periods of experiment, the 1936 order of the Interstate Commerce Commission remained substantially unchanged until the order of January 21, 1942.

This last order of the commission resulted from a petition by the railroads, among them the respondents, for authority to increase their rates, fares and charges. The petition, Exhibit V, prays for an increase "of 10% in all fares," and also asks "that the cooperation of the State Commissions be invited, as provided by law, in any investigation instituted and conducted by the Commission." The order, Exhibit M, provides "that the increased passenger fares as proposed by the said petitioners be and they are hereby approved." No express statement that the intrastate rates shall be increased is contained in the order

(nor so prayed for in the petition). Nor, upon careful analysis of its entire context, read in the light of its antecedent history, can such an inference be drawn from the provisions of the order modifying the prior orders "only to the extent necessary to permit the increase herein authorized"; nor from the fact that the order requires that it be filed in the dockets of the prior proceedings which considered intrastate rates.

(The order of January 21, 1942, contains this provision: "It is further ordered, that all outstanding orders, as amended, of the Commission, authorizing or prescribing interstate and *intrastate fares*, or bases of fares be, and they are hereby modified, effective concurrently with the establishment of the increased fares herein approved, only to the extent necessary to permit the increase herein authorized, to be added to the interstate and intrastate fares approved or prescribed in, or maintained or held by virtue of said outstanding orders; * * *." This provision, standing altogether by itself, would lend strong support to the claim of the respondents that the Interstate Commerce Commission had intended to increase intrastate rates. Why amend orders dealing with intrastate rates if there was no intention to deal with them? But the provision quoted must be read in the light of the entire order, its preambles as well as its directing provisions. Thus read, it becomes clear that the purpose of the quoted section of the order is merely to render possible action by the state regulatory bodies, to approve similar increases in intrastate rates. In its first preamble the order refers to the fact "that proper authorities of all states have been notified of this proceeding and *similar* application has been or *will be* made to the regulatory authority of the respective states for *permission* to increase *similarly* petitioners' *intrastate* rate fares and charges." In the light of this recitation, it is obvious that in this aspect no more was intended by the order than to lift any restrictions that might exist barring applications to the state regulatory bodies for permission to increase intrastate rates.)

The report upon which the order of January 21, 1942 is based was not before me on the trial, nor until after the

final submission and exchange of briefs. It was issued on March 2, 1942. Now that it has been brought to my attention, I have studied it with care and it is to be deemed as part of the record.

Unfortunately there is nothing contained therein which tends to resolve the doubt engendered by the wording of the order itself. The intention or lack of intention to treat with intrastate rates is still obscure, as the report employs the same form of expression found in the order of the commission without further explanatory reference.

I must conclude that under the circumstances of this proceeding it is impossible to hold that there exists any explicit requirement of the Interstate Commerce Commission that the intrastate passenger rates of these respondents must conform to the interstate rates authorized by the order of January 21, 1942, or that the order of January 21, 1942, in any way directs the respondents to increase their passenger rates by 10 per cent in intrastate commerce.

Except only where intrastate rates fixed by state authorities have been found to interfere unduly with interstate commerce, the prerogative of the state in regulating railroad rates are not subject to interference by congressional action nor to any powers delegated to the Interstate Commerce Commission. The maintenance of a sound railroad system is of vital concern to the people of the State of New York and that this can be achieved only through the careful supervision of the railroads by a governmental agency conversant with the problems and charged with the high duty of alert and circumspect regulation is a lesson which the last fifty years have taught to the American public at no inconsiderable cost. This is not to doubt either the wisdom or necessity of similar supervision in interstate commerce by federal agencies nor to fail to realize that where a clear conflict exists between state and federal regulation the latter must prevail (*Pennsylvania RR. Co.* v. *Illinois Brick Co.*, 297 U. S. 447). Only the other day, the Supreme Court of the United States, speaking through the Chief Justice, said: "The power of Congress over interstate commerce is plenary and complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution (*Gibbons* v. *Ogden*, 9

Wheat, 1, 196). It follows that no form of state activity can constitutionally thwart the regulatory power granted by the commerce clause to Congress. Hence the reach of that power extends to those intrastate activities which in a substantial way interfere with or obstruct the exercise of the granted power". (*United States of America* v. *Wrightwood Dairy Co.*, decided February, 2, 1942, 10 U. S. Law Week 4191, at 4192).

While these principles are firmly fixed in the framework of our constitutional law, here neither Congress nor the Interstate Commerce Commission has spoken. The maintenance of the dignity and importance of state regulatory bodies requires that their powers and functions be safeguarded by the courts, and that their authority, where it exists, be fully enforced. The remedies which the respondents have are by appeal directly to the Interstate Commerce Commission itself. "The appropriate remedy," said Mr. Justice Brandeis, "under such circumstances is an application to the Commission requesting it to suspend the operation of the order in so far as it may affect isolated cases and if necessary to enter an independent order dealing specifically with them" (*Georgia Public Service Commission* v. *United States of America, supra*, at p. 772).

The respondents have sought to limit the preamble in the order of January 21, 1942, which recites that *similar* application will be made to state regulatory bodies for permission to increase intrastate rates, to rates for the transportation of milk and cream and rates charged for commutation fares. But the history of the rate regulation of these respondents by the Interstate Commerce Commission forbids such an interpretation. Exhibit R, which is the order of the Interstate Commerce Commission, entered on the 12th day of December, 1927, specifically vacated that portion of the order of November 13, 1920, in so far as it regulated rates for the transportation of "milk, cream, skim milk, butter milk, condensed milk, evaporated milk and pot cheese in intrastate commerce within the State of New York." The right of the state regulatory bodies, therefore, to fix intrastate rates with respect to these commodities from the date of that order was complete. At the same time, the order of the Interstate Commerce Commission of January

21, 1942, in *Ex Parte* 148, as we have seen, provided for an increase in rates "as proposed by the said petitioners." The petition, Exhibit V, specifically includes a proposal by the respondents here that "a uniform increase of 10% in all fares, including rates and charges for milk and cream and articles grouped therewith" be permitted. It is apparent, therefore, that the order of the Interstate Commerce Commission, in *Ex Parte* 148, if held to apply to intrastate rates, would necessarily include rates on milk and cream and the quoted preamble relied on by the petitioners here could hardly be given the limited scope which the respondents urge.

Again, with respect to commutation fares, the order of the Interstate Commerce Commission of the 13th of November, 1920, Exhibit F, expressly excluded commutation fares from the increase in intrastate rates there ordered. It was, therefore, not necessary to modify that order to permit state regulatory bodies to authorize an increase in commutation fares. Presumably, the Interstate Commerce Commission, *in 1920*, was of opinion that the maintenance of a lower rate for commutation fares did not work a discrimination against interstate commerce, and my attention has not been called to any finding by the commission that any other conclusion was urged by them thereafter.

Finally, the argument limiting the scope of the preamble quoted loses sight of the two words "similar" and "similarly," used in the preamble. What the Interstate Commerce Commission envisaged by its order was a *similar* application to increase similarly petitioners' intrastate rates. To say that these words are limited only to rates for milk and cream and commutation fares would seem to distort the meaning of plain words by arbitrarily contracting their usual, plenary significance.

Much has been said concerning the continued effectiveness of the order of the Interstate Commerce Commission in docket number 11263, made November 13, 1920, Exhibit F. On the part of the respondents, it is argued that that order is still in force, and in effect requires the maintenance, until further order of the Interstate Commerce Commission, of intrastate rates on a level with interstate rates. Although disavowed in oral argument, the briefs submitted by the

respondents frequently make the point that the effect of that order is to require intrastate rates to be maintained permanently at a level with interstate rates. On page 9 of the respondents' reply brief they say: "The cumulative effect of the above is to establish that the thirteenth section order in docket number 11263 did not die in 1936, but remained in full force and effect as modified, for the purpose of establishing a minimum level for intrastate passenger fares within New York so as to prevent the discrimination which the Commission found would result from a level of intrastate fares within this State lower than interstate fares." This can only mean that the respondents contend that intrastate rates cannot be reduced below interstate rates, regardless of what changes are ordered by the Interstate Commerce Commission in interstate rates, and in spite of continued complete silence, both as to findings and order, with respect to intrastate rates. But an examination of the order made by the Interstate Commerce Commission in docket number 11263 reveals that it cannot be made to bear this burden. The order explicitly says that the railroads are directed "to cease and desist" from practicing the undue prejudice against interstate commerce there found and they are directed to establish rates in intrastate commerce comparable to rates then in effect under the order in *Ex Parte* 74. Taken literally, it would mean that the respondents are required to maintain their intrastate rates at the level fixed by the commission for interstate rates in *Ex Parte* 74. But the rates fixed in *Ex Parte* 74 have been several times amended by the commission, the last amendment being authorized in *Ex Parte* 148, by the order of January 21, 1942. There is nothing, either in the order, Exhibit F. in docket number 11263, or in any subsequent order of the Interstate Commerce Commission which justifies the conclusion urged by the respondents that the intrastate rates of these respondents must be forever maintained at the level of the varying interstate rates authorized by the commission from time to time. Had the commission made such an order, it could not be for this court to question its power to do so. But if the view I entertain is sound, that the commission would be without power to make such a blanket order for all time—that there is necessary a specific

finding in each case or at least recurrently—that discrimination against interstate commerce required it, then it is clear that language more explicit and plain would be required to justify the conclusion that the commission intended that result. I repeat, had the commission made such an order, it would not be subject to review in this court; but I may not agree that the Interstate Commerce Commission would obliquely make an order under circumstances such as these, where its power to do so is open to serious question.

The practice adopted by the railroads in 1920 throws further light on this issue. There too the order increasing railroad rates, in general language, was assumed by the railroad to apply to intrastate rates. But it was not until a separate proceeding was brought under section 13, subdivisions 3 and 4 of the act, before the Interstate Commerce Commission, and an express finding of discrimination against interstate commerce was made that an order of the commission was entered directly dealing with intrastate rates.

Upon the utmost that can be said for the position of the respondents, it remains that the scope of the order of the Interstate Commerce Commission of January 21, 1942, is in doubt. But I am enjoined to resolve such doubt in favor of the right of the state regulatory bodies. As the Supreme Court of Illinois said in *Rockwell Lime Co.* v. *The Commerce Commission* (373 Ill. 309, 319, cert. den. 311 U. S. 600): "Where a serious doubt obtains as to whether an order of the Federal Commission extends to intrastate rates, the doubt should be resolved in favor of the exercise of the state's power." To the same effect is the opinion of Mr. Justice Brandeis in *American Express Co.* v. *South Dakota ex rel. Caldwell* (244 U. S. 617).

Where an order is ambiguous, reference may be had to the report of the commission (*Illinois Commerce Commission* v. *United States of America*, 292 U. S. 474; *Georgia Public Service Commission* v. *United States of America*, 283 U. S. 765).

Presumably, either side to this proceeding is at liberty to apply to the Interstate Commerce Commission for a clarification of its orders. A further order of the Interstate Commerce Commission might very well be entered either

explicitly asserting that the matter of intrastate rates in the State of New York has been left to our state regulatory bodies or directing that they be increased to a parity with interstate rates. The decree to be entered herein, therefore, will provide that either party may, at the foot thereof, apply for an order amending the decree modifying the injunction to be granted herein, in part, or vacating it in its entirety.

This proceeding, as I have earlier pointed out, has been brought under the authorization contained in section 57 of the Public Service Law. There, the court is enjoined that "the final judgment in any such action or proceeding shall either dismiss the action or proceeding or direct that a writ of mandamus or an injunction, or both, issue as prayed for in the petition or in such *modified or other form as the court may determine will afford appropriate relief.*"

Accordingly, a decree will be entered making the temporary injunction permanent; but providing that either side may apply, at the foot of the order, for a modification thereof or to vacate the same upon the presentation of further clarifying orders of the Interstate Commerce Commission.

Findings of fact and conclusions of law having been sufficiently indicated in this opinion, they are hereby dispensed with.

Settle decree on three days' notice.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1942.

No. 178

ILLINOIS COMMERCE COMMISSION, AND JOHN D. BIGGS, WILLIAM PARRILLO, FRANK PESKA, EDWIN A. ROSENSTONE, AND VAL J. WASHINGTON, INDIVIDUALLY AND AS MEMBERS OF AND CONSTITUTING THE ILLINOIS COMMERCE COMMISSON; DWIGHT H. GREEN, INDIVIDUALLY AND AS GOVERNOR OF THE STATE OF ILLINOIS; GEORGE F. BARRETT, INDIVIDUALLY AND AS ATTORNEY GENERAL OF THE STATE OF ILLINOIS; THOMAS J. COURTNEY, INDIVIDUALLY AND AS STATE'S ATTORNEY OF COOK COUNTY, ILLINOIS; HARRY A. HALL, INDIVIDUALLY AND AS STATE'S ATTORNEY OF LAKE COUNTY, ILLINOIS; LEE E. DANIELS, INDIVIDUALLY AND AS STATE'S ATTORNEY OF DUPAGE COUNTY, ILLINOIS; CHARLES G. SEIDEL, INDIVIDUALLY AND AS STATE'S ATTORNEY OF KANE COUNTY, ILLINOIS, AND WILLIAM M. CARROLL, INDIVIDUALLY AND AS STATE'S ATTORNEY OF MCHENRY COUNTY, ILLINOIS,

Appellants,

vs.

CHARLES M. THOMSON, AS TRUSTEE OF THE PROPERTY OF CHICAGO AND NORTH WESTERN RAILWAY COMPANY, A CORPORATION,

Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES, FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

APPELLANTS' BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR AFFIRM.

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THE DONNELLEY-GARDEN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES, FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

APPELLANTS' BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR AFFIRM.

Appellee's motion to dismiss this appeal or to affirm the determination of the lower court is founded upon certain premises which may be concisely but nevertheless

very fairly stated in the form of the following propositions:

First: That because the order of January 21, 1942, sanctioning a ten per cent increase in interstate and intrastate passenger fares was entered in continuation of a proceeding initiated in 1925, at which time the Inter-State Commerce Commission first assumed and exercised jurisdiction over the rates in question, and because appellants do not challenge the sufficiency of the findings of fact in the orders of 1925 and 1936, the recitals in the earlier orders must be deemed sufficient to support—*not* the rates fixed in 1925 and 1936 alone—but also a *higher* schedule of rates fixed in 1942.

Second: That the "legislative character" of the order in question *exempts* it from the basic requirement of due process of law that administrative orders must be supported by specific findings; that is to say, that because (as this court has repeatedly held and as appellants concede) an order intended to be general in the scope of its application may be based on "average", "generally prevailing", "common", or "ordinary" conditions and because the Commission admittedly not only need not but could not find the facts with respect to each particular rate affected, the Interstate Commerce Commission may therefore not only dispense with the finding of facts peculiar to each rate involved, but may dispense with the findings even as to the "average" or "generally prevailing" conditions which must justify the order if it can be justified at all.

Third: That in any event the order, together with recitals in the report of March 2, 1942, does contain findings sufficient to support its provisions.

Fourth: That, notwithstanding this court's repeated pronouncements that an order not supported by findings of fact is unconstitutional, null and void, appellants may not defend against such an order upon the ground of such unconstitutionality because, as appellee contends, the order is invulnerable to "col-

lateral attack" even on the grounds of its unconstitutionality.

Fifth: That the order is not only valid but is mandatory and not not merely permissive.

Sixth: That the injuction must be sustained, independently of the order of the Interstate Commerce Commission, because the rates in force prior to March 8, 1942, were confiscatory in character.

We shall briefly reply to each of the contentions above summarized in the order indicated.

I.

Nothing in the Earlier Orders in the Proceedings in Which the Instant Order Was Entered Either Excuses or Supplies the Want of Findings of a Change in Conditions Justifying an Increase in Rates.

Appellee seeks to integrate the present order with the Commission's 1925 order (Exhibit A attached to the complaint) and its 1936 order and to derive from the findings embodied in these earlier orders support for the order now under consideration.

Let it be assumed that the 1925 and 1936 orders were based upon proper recitals of sufficient fact. But manifestly those facts justified those orders—not the present order. Recitals of findings that one state of facts existed in 1925 and that another state of facts existed in 1936 do not amount to findings that a *different* state of facts exists in 1942.

Appellants do not contend that the present order may not properly refer to previous orders as bearing upon the situation of the carriers at the time that those orders were entered. But clearly those findings justify the rates fixed years ago—*not* a change or increase in those rates. We shall not further protract our argument that findings

made over sixteen years ago and over five years ago, respectively, justifying a rate schedule at that time, do not and cannot justify an increase in that schedule in 1942.

Therefore the appellants contend that the order of January 21, 1942, is invalid for want of sufficient findings of fact.

II.

The Legislative Character of the Order in Question Did Not and Could Not Dispense With the Constitutional Requirement That Administrative Orders Must Be Supported by Findings of Fact.

Appellee argues that because orders of the kind here involved are frequently and, in the sense intended, correctly referred to as "legislative" in character, such orders need not embody specific findings of fact. As we shall point out a little later in this brief, an examination of the very cases relied upon by the appellee, as well as the consideration of other pertinent decisions, makes it clear that, directly contrary to the argument in support of which appellee's cases are cited the rule is that "legislative" powers can constitutionally be delegated to an administrative agency *only upon the condition that the agency find and recite the factual basis for the exercise of the delegated powers;* and that the facts must not only be found but recited in order to impart validity to "legislative" commands of executive agencies.

But before considering the applicable authorities, the appellants wish to make the following important, preliminary observations:

The appellee is quite correct in contending that since the transportation act of 1920, the Commission may—and obviously must—base its general orders upon a broad view of the general situation of the carriers against a perspective of the national economy. The Commission

need not and, indeed, cannot find or make in such a general order a "reasonable rate" for each carrier in the country as to each commodity transported or each passenger service rendered between each point of origin and destination. The Commission may and perhaps must predicate its general order, comprehensive in scope, upon a "law of averages" and upon common, ordinary, or generally prevailing conditions, reserving jurisdiction to correct by appropriate specific orders particular inequalities as to particular rates. (The *New England Divisions case*, 261 U. S. 184.)

Now, as we shall show by the authorities, this merely means that the Commission may find facts as to general, common or average conditions. But, as the cases indicate, it does **not** mean that conclusions may be substituted for facts, even if the facts themselves are those of an average, general or common situation. In other words, the Commission might, indeed, find the general or average proportion of passengers to freight traffic and the general or average proportion of expense of labor, other operating costs, depreciation, capital expenditure and other factors attributable to different kinds or classes of service, frankly recognizing the possibility or even the certainty of individual hardship and reserving jurisdiction to correct such hardship by specific order.

But the basis of a rate schedule, even if generalized by averages, is none the less a *factual* basis. If, for example, such specific items as labor cost, the cost of maintenance, depreciation, and the like have increased by, let us say, ten per cent on the average, that **average** increase is as much a fact as would be the increase in cost of a particular haul by a particular carrier.

The *facts*—even if they are "*average*" facts—should be found; and a mere pronouncement that rates are "reasonable", "fair", or "just", or that they are

"necessary to enable petitioners to continue to

render adequate and efficient railway transportation service",

or that

> "the passenger service justly and reasonably should contribute to meeting the added operating cost of the railroad"

is a conclusion, whether these opinionative terms are applied to a single rate or to all of the rates in the country.

A case cited by the appellee in support of its contention that orders "legislative" in character need not be supported by specific findings but actually directly hostile to that contention is *St. Joseph Stockyards Co.* v. *U. S.*, 298 U. S. 38. That case is a leading one upon the "legislative character" of administrative orders fixing rates. It is pointed out in no uncertain terms that where Congress directly and immediately enacts a command, such as the establishment of a rate schedule,

> "its determinations are conclusive",

but the case further holds, no less clearly, that Congress may delegate legislative powers *only provided that the exercise of such power is conditioned upon an administrative "finding of facts"*.

The court said at page 51:

> "When the legislature itself acts within the broad field of legislative discretion, its determinations are conclusive. When the legislature appoints an agent to act within that sphere of legislative authority, it may endow the agent with power to make **findings of fact** which are conclusive, **provided the requirements of due process which are specially applicable to such an agency are met**, as in according a fair hearing and acting upon evidence and not arbitrarily. *Interstate Commerce Comm'n* v. *Louisville & Nashville R. Co.*, 227 U. S. 88, 91; *Virginia Ry. Co.* v. *United States*, 272 U. S. 658, 663; *Tagg Bros. & Moorhead* v. *United States*, *supra*, p. 444; *Florida* v. *United States*, 292 U. S. 1, 12." (Emphasis supplied.)

Incidentally, it is interesting to contrast the findings in that case with those in the present case. The court said at page 46:

> "The findings are elaborate. They include detailed findings with respect to the services rendered by appellant and its rates, the used and useful character of appellant's property, the valuation of used and useful land, the value of appellant's structures on the basis of cost of reproduction new less depreciation, working capital, going concern value, fair value on the basis of the facts found, fair rate of return, reasonable operating expenses (including repairs, depreciation and taxes), necessary revenue and volume of business."

No such recitals are to be found in the presen. order.

To maintain service the carrying rates, both interstate and intrastate, must be adequate; but the adequacy of the rates must be ascertained from a *factual* basis. Such rates must be equitably proportioned among the classes of traffic; and equitable proportion requires a determination of facts.

The appellee attempts to distinguish the following cases cited by the appellants in their original brief.

State of Florida v. *U. S.*, 282 U. S. 194.

U. S. v. *Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499.

Atchison Ry. Co. v. *U. S.*, 295 U. S. 193.

The basis upon which the appellee undertakes to discriminate these cases from the instant case is that in the cases cited the orders in question were not general orders, national in scope. But no authority cited by the appellee and no sound reason advanced in his brief suggests that although the Commission may *not* increase a particular rate without making findings, it *may* impose upon the traveling public a blanket ten per cent increase in passenger fares effective throughout the country with only such

generalities and conclusions as pronounce the new rate "necessary", "fair", "just", or "reasonable". As the cases cited above hold, these adjectives merely sum up the Commission's opinion or conclusion. No facts are stated to support the above conclusions. As has been pointed out (Appellants' Original Statement) the courts have repeatedly held that such findings are insufficient to support an order of the character here in question.

We have carefully examined each of the authorities cited by the appellee in his brief. Not one of them declares, either directly or by intimation, either by way of holding or by way of *dictum*, that the Interstate Commerce Commission may exercise "legislative" faculties in ordering a general increase in rates without making adequate findings.

On the contrary, in the case of *Panama Refining Co. v. Ryan*, 293 U. S. 388, cited by the appellants in their original statement, the order in question was promulgated by the President and was intended to effectuate a policy national in scope, having for its object the vitally important conservation of oil and petroleum products. So far as the generality of the purpose of this order was concerned, the order there was similar to the order here. Yet the Supreme Court held the order unconstitutional for want of sufficient findings.

The appellants therefore submit that the appellee's arguments are not sufficient to sustain the premise that an order, even though "legislative" in character and general in nature, is valid when not supported by sufficient findings of fact.

III.

The Recitals in the Present Order and in the Supplementary Report Are Insufficient to Sustain the Order.

Under Point I of this statement it was submitted that the findings and recitals in the orders of 1925 and 1936 cannot sustain the order entered in 1942. Under Point II of this statement it was shown that neither authority nor reason exempts an order from the requirement of due process that it be supported by sufficient findings of fact merely because the order is general in scope. If appellants are correct in their contention that the present order must be supported by adequate findings, the question arises as to whether that requirement is met in the instant case.

We shall not repeat at length the matter developed under Point I of the argument in support of our original statement as to jurisdiction. Under that Point it was clearly demonstrated that mere pronouncements that rates are "reasonable", or "unreasonable", "fair" or "unfair", "just" or "unjust", or "necessary" or "unnecessary", are insufficient. *State of Florida* v. *United States*, 282 U. S. 194. *U. S.* v. *Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499.

If the increase in rates is justified at all, its justification must be found in a comparison of such data as the following: the estimated increase in the cost of operation of the nation's railroads for both freight and passenger traffic, on the one hand, and on the other hand the augmentation of revenues due to the increase of freight and passenger traffic; a fair and reasonable allocation of the total expense of operation between passenger and freight traffic; a fair and reasonable allocation of the total expense of operation between interstate and intrastate commerce; and other facts, a consideration and estimation of which is re-

quired by the fundamental principles of public utility economics.

As we have previously pointed out (*this statement, ante*, Point II), appellants do not contend that the Commission either could or should have made particular findings as to each particular haul of each particular kind of freight for each particular carrier in the country, but as we have also pointed out, any increase in rates must have its basis in facts, and such facts must be found in the recitals of the order.

Unless the Commission acted upon facts and figures, even if the facts and figures were those of a general average, the order is arbitrary and capricious; and *if* the Commission acted on such facts, they should have been recited in the order.

For the reasons already urged in appellants' original statement, appellants contend that the order in question does not meet the constitutional requirement of due process that administrative regulation must in all cases and without exception be predicated upon the finding of the facts justifying the regulation.

IV.

The Present Order Is Subject to Collateral Attack by the Appellants in the Present Proceedings.

At various points in his brief, appellee conducts an adroit and skillful argument that the appellants may not in the present proceedings challenge the validity of the order upon which appellee relies.

Appellee points out that the cases cited by appellants were injunction proceedings in which it was sought to restrain the enforcement of orders of the Interstate Commerce Commission or other agencies and seeks upon that ground to distinguish those cases from the instant cause.

There are two replies to appellee's argument: in the first place, it is well understood that a "direct attack" upon an order or judgment as distinguished from a collateral attack, is an attack upon it in the proceeding in which it is entered or in some continuation thereof, as, for instance, upon a statutory review in the nature of an appeal from or a writ of *certiorari* to a commission or court making the order; and that a collateral attack is an attack in an independent proceeding wherein the order is assailed as absolutely void.

Each of the cases cited by appellants was an independent equity proceeding, and to that extent, at least, similar to the present proceedings.

The cases cited by appellee as observing a distinction between what appellee calls "direct attacks" and "collateral attacks," as appears from appellee's own synopsis of the bearing of the cases which he cites, is that in proceedings to which the Interstate Commerce Commission is not a party the court will not review the *evidence* to determine whether such *evidence* supports the *findings*. Admittedly the evidence upon which the present order was based is not and could not properly be in the record in the instant cause.

But in the case of *U. S.* v. *Chicago, M., St. P. and P. R. Co.*, 294 U. S. 499, it was held that evidence will not take the place of findings (see page 504); and the court further declared on the same page that

> "an order of the Interstate Commerce Commission is *void*"

unless supported by proper findings.

If, as appellants contend, the order is unconstitutional for want of proper findings, it is absolutely void—a complete nullity. Of course, an order which is absolutely void on its face is always subject to collateral attack.

In the *second* place, appellee's argument, when properly

analyzed, amounts to the remarkable proposition that even though equity would *enjoin* the exercise of the present order in the suit brought for that purpose, it will nevertheless enforce and give effect to that order by affirmative injunction in the suit of these plaintiffs, and that the defendants are precluded from resisting negatively and by way of defense the effect of the present order because they have not affirmatively asked to have it enjoined.

The sophistry of this argument is best exposed by a clear statement of the argument itself.

V.

Notwithstanding the Plaintiff's Argument to the Contrary, the Only Effect of the Order, Even If It Is Valid, Is to Assent to the Increase of Rates But Not to Supersede the Jurisdiction of the State Commission.

The plaintiff's criticism of the decision of the New York Supreme Court in the case of *Transit Commission* v. *Long Island Ry. Co.*, (plaintiff's original brief, Appendix B), is premised upon several arrant fallacies.

In the first place, the plaintiff correctly says at page 24 of his brief:

> "Under our system of dual sovereignities, where Congress through its agency, as here, has taken action, the legislative field is occupied exclusively by the federal authority, leaving the state without any power at all."

This premise is correct, but it proves too much. It begs the question of whether the Commission has in fact commanded the increase of rates. But it *refutes* the plaintiff's contention that federal sanction to the increase in question was unnecessary; for if by its 1925 and 1936 orders the

Commission has exclusively occupied the field. In the language of appellee,

> "there is no room left for action by the state whether it be conflicting or concurring action."

Then, according to the reasoning of appellee's counsel at this point, but contrary to his reasoning elsewhere, the consent or sufferance of the Commission *is* necessary before the state commissions can act.

At page 26 of his brief the plaintiff argues that to accede to the construction given this order by the New York court would be to

> "nullify * * * a substantial portion of it."

Of course this statement again begs the question of whether it was the effect of the order to *authorize* or merely *assent* to the increase in rates. If, as the defendants contend and as the New York court held the latter, is the true purport of the order, then the New York decision does not nullify but merely gives effect to the order according to its terms.

We shall not rehearse the careful reasoning of the opinion of that case, nor shall we repeat the substance of our argument upon the question of the construction of the order. (Appellants' Original Statement, Point II.)

We again remind the court, however, that had the Commission intended to command and render obligatory the ten per cent increase in passenger fares, almost certainly it would have used mandatory, not merely permissive, language, and it would have made the findings of fact required for an order so far-reaching and drastic in its effect.

VI.

Contrary to Appellee's Contention, the Present Proceeding Does Not Involve Any Question of Appellee's Right to Relief Independently of the Order of the Interstate Commerce Commission.

Appellee argues under Point X of his statement that the fares sought to be established by appellants were properly enjoined

> "because of their clearly established confiscatory character and quite independently"

of the order of the Commission. The plaintiff's complaint could not and was clearly not intended to precipitate any question of the confiscatory character of the former rates or of the plaintiff's right to relief from such confiscation, apart from the opposing authority of the order now in question.

The complete irrelevance of appellee's attempt in this court to treat the proceeding in the lower court as one for relief from confiscation, apart from the effect of the Interstate Commerce Commission's order can be shown in a very few words.

The complaint made absolutely no showing that the plaintiff had ever petitioned the Illinois Commerce Commission for the increase in rates here sought upon the ground that the antecedent rates were confiscatory. Although the complaint does contain some allegations that the service in question is operated at a loss, it does not intimate or hint that the plaintiff ever made or offered to make any such claim before the Commission or that he resisted the order which he now seeks to enjoin on any ground other than the ground that it was in conflict with the order of the Interstate Commerce Commission.

As absolutely conclusive that appellee could not have

litigated in the lower court and cannot litigate in this court any question of confiscation, appellants cite the decision of this court in *Natural Gas Co.* v. *Slattery*, 302 U. S. 300. In that case the Illinois Commerce Commission entered an order requiring a utility to produce certain books and records in connection with an investigation of an affiliated company. The utility, protesting that it was not subject to the jurisdiction of the Illinois Commerce Commission and that the books requisitioned were so voluminous that a compliance with the order would constitute an unconstitutional invasion of its property rights, sued to enjoin an enforcement of the order. The utility failed to show that after the order was entered, it had assailed it before the Commission upon the grounds asserted in the suit in the federal court. The court said at pages 309 and 310:

> "We have no occasion to consider the merits of these objections. It suffices to say that the statute itself provides an adequate administrative remedy which appellant has not sought. By §§ 64 and 65 of the Act the commission was authorized on its own motion or on application of appellant to order a hearing to ascertain whether the present order was 'improper, unreasonable, or contrary to law.' Section 67 authorizes the commission at any time, upon proper notice and hearing, to 'rescind, alter or amend any * * * order or decision made by it.' We see no reason, and appellant suggests none, for rejecting the trial court's ruling that the commission, if asked, could have modified its order, or for concluding that the commission was without authority to suspend or postpone the date of the effective operation of the order so as to avoid the running of penalties, pending application for its modification. *Porter* v. *Investors Syndicate*, 286 U. S. 461, 470; 287 U. S. 346."

In this case, neither before nor after the order was entered did the appellee make any objection to it on the ground that, apart from the order of the Interstate Com-

merce Commission of 1942, the rates imposed by the Illinois Commission were confiscatory. There is no intimation that the Commission would not have entertained such a contention and have determined it fairly and fully.

It is not deemed necessary to cite other authorities to the effect that a utility cannot in the first instance visit upon a court of equity the duty of increasing a schedule of rates before exhausting administrative relief.

VII.

Sundry Observations.

Appellee imputes to appellants and then replies to various contentions which appellants do not make. It is deemed necessary very briefly to correct the distortion of appellants' original argument which results from appellee's misapprehension of its substance.

Appellee labors his argument that the Interstate Commerce Commission has jurisdiction not only over interstate fares but over intrastate fares to the extent necessary to compel intrastate commerce to bear its fair proportion of the burden of all commerce and to the extent necessary to prevent discrimination against interstate commerce. Appellants do not for a moment dispute this well settled proposition. Appellants admit that if the present order were justified by facts and if those facts were properly found, it would represent an entirely valid exercise of the Commission's power.

Appellee also argues that if it was necessary to raise interstate passenger rates by ten per cent, "simple arithmetic" (in the language of the appellee) "is sufficient to demonstrate that it was necessary to raise intrastate rates by the same percentage in order to preserve the proportions of the rate structure." Of course this is true. Ap-

pellants maintain, however, that neither interstate rates nor intrastate rates could be validly increased without proper findings of fact. Appellants contend that the entire order, so far as it affects passenger rates, is invalid; however, they had no occasion to resist the order as applied to interstate rates because appellee sought an injunction against them with respect to no rates other than those which were intrastate.

CONCLUSION.

For the reasons set forth in appellants' original statement, and in this reply, appellants respectfully submit that the questions presented by this appeal are substantial, and pray that the appellee's motion to dismiss the appeal or affirm the decision of the lower court be denied, and that this appeal be fully considered upon its merits.

Respectfully submitted,

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Attorney General of the State of Illinois,
Attorney for Appellants.

Albert E. Hallett,
Assistant Attorney General,
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FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 178

ILLINOIS COMMERCE COMMISSION, JOHN D. BIGGS, WILLIAM PARRILLO, ET AL.,

Appellants,

vs.

CHARLES M. THOMSON, AS TRUSTEE OF THE PROPERTY OF CHICAGO AND NORTH WESTERN RAILWAY COMPANY,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

APPELLANTS' BRIEF.

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APPELLANTS' BRIEF.

STATEMENT RESPECTING OPINIONS.

The court below delivered no written opinion or discussion of the case, but did make certain findings of fact and reached conclusions of law in connection with the entry of the decree in question (R. 50). The nature of the findings and conclusions, in relation to the facts in the case, appear later in this brief.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

This court has already noted probable jurisdiction in this case.

The final order, judgment or decree here appealed from was rendered by a statutory court consisting of one circuit and two district judges, specially convoked under the provisions of Section 266 of the Judicial Code (28 U. S. C. A., Sec. 380).

This order, judgment or decree (R. 56) permanently restrains the defendants (appellants here), who are the Illinois Commerce Commission and various Illinois state officials, from taking any action against the plaintiff (appellee here), who is trustee of the property of the Chicago and North Western Railroad Company, or his agents, on account of their charging increased fares for intrastate transportation of passengers on the railroad in question, or on account of their violation of a certain order of the Illinois Commerce Commission, entered on February 18, 1942. The order of the Illinois Commerce Commission last mentioned (R. 35) purported to suspend the effective date of the increased tariffs in question pending an investigation by that commission into the necessity for the propriety of such increases.

The plaintiff contended and the trial court held (R. 55) that an order of the Interstate Commerce Commission (R. 32), entered January 21, 1942, authorized and commanded the increase in tariffs; that such order superseded the jurisdiction of the Illinois Commerce Commission with respect to the increase; that the order was in all respects valid; and that the enforcement of any order by the Illinois Commerce Commission or of any state statute inconsistent with the order of the Interstate Commerce Commission would con-

stitute a violation of the federal constitution and of acts of Congress deriving their authority therefrom.

The defendants contended that:

First. The order of the Interstate Commerce Commission was void for want of adequate findings of fact, it being argued by the defendants that the purported findings in the order did not comply with the constitutional requirements of due process of law.

Second. That even if the order should be deemed valid, its tenor and purport was **not** to supersede state action, but merely to **authorize and approve** the increase in tariffs if such increase should be sanctioned by state legislatures or state regulatory commissions.

While the attack is upon this particular order and not upon the basic validity of the Illinois statute, it is contended by the plaintiff that the Illinois Public Utilities Act, upon which the said order necessarily must depend for its validity, cannot, consistently with constitutional principles, be regarded as authorizing the order in question. It is, therefore, quite obvious that the case does necessarily precipitate the question of whether the said Illinois Statute above referred to can constitutionally be applied to the plaintiff in the instant case.

The Illinois Public Utilities Act (Illinois Revised Statutes, Chapter 111⅔, sections 1-95, inclusive) above referred to provides, in substance, as follows:

Section 9 requires public utilities to obey the orders of the Commission.

Section 33 requires public utilities to file schedules of their tariffs with the Commission.

Section 34 requires public utilities to publish such schedules.

Section 35 prohibits public utilities from rendering services without filing schedules.

Section 36 prohibits public utilities from modifying their tariffs without notice to the Commission, and provides that the Commission may suspend the effec-

tive date of such new tariffs pending an investigation into their propriety but not for more than 120 days, plus an extension of 6 months if such investigation is not then completed.

Section 37 prohibits such utilities from charging more or less than their published tariffs.

Section 41 authorizes the Commission to fix and determine public utility rates.

Section 64 authorizes the Commission to hold investigations as to public utility rates.

Section 80 provides penalties for any violation of the Act.

Section 81 makes persons violating the Act guilty of a misdemeanor and subject to fines not to exceed $1,000.

Section 82 provides for actions to recover penalties for violations of the Act.

The complaint further contends that a certain Illinois statute, commonly known as the Illinois Two Cent Fare Law, approved May 27, 1907, as amended in 1913 (Illinois Revised Statutes, 1941, Chapter 114, Sections 154-156), is likewise unconstitutional as applied to this case. This Act provides, in effect, that it shall be unlawful for any railroad company carrying passengers between points in Illinois to charge in excess of two (2) cents per mile for such passage, and provides certain penalties for violations of such provisions to be recovered by actions to be brought by the Attorney General of the State, or by the State's Attorney of any County in which such railroad operates.

Section 266 of the Judicial Code (28 U. S. C. A., Sec. 380) concludes as follows:

"• • • and a direct appeal to the Supreme Court may be taken from a final decree granting or denying a permanent injunction in such suit."

STATEMENT OF THE CASE.

Prior to and on March 7, 1942, the plaintiff collected the intrastate passenger fares fixed by an order of the Interstate Commerce Commission of October 6, 1925, in a proceeding entitled

> "In the Matter of Intrastate Rates Within the State of Illinois, No. 11705 (102 I. C. C. 479)."

A copy of this order appears as Exhibit "A" to the complaint (R. 19).

In December, 1941, the Interstate Commerce Commission undertook a "further nationwide general investigation of both freight rates and passenger fares to determine whether or not an increase of ten per cent therein should be authorized," that proceeding being known as

> "*Ex Parte* 148 Increased Railway Rates, Fares, and Charges, 1942" (R. 8).

On January 21, 1942, that Commission

> "authorized the railroads, including the plaintiff herein, to increase their passenger rates, fares and charges ten per cent." (Plaintiff's complaint, page 10, R. 8.)

A copy of this order appears as Exhibit "B" to the complaint (R. 32).

It is upon this order and upon this order alone that the plaintiff founds his contention that it is at once his right and his duty to charge the fares approved in such order. The plaintiff's complaint is not conceived in form or substance upon the theory that it asserts a right to have the propriety of the schedule of increased rates determined by a court independently of and without regard to the order of the Commission.

The first two paragraphs of the order recite matter of procedural history—the filing of the petitions, the notifi-

cation of the authorities of all states, the fact that hearings have been had and investigation made, and that the Commission has had the co-operation and advice of a committee consisting of members of state regulatory authorities (R. 32).

The only recital purporting to state the basis for the order is contained in the third and fourth paragraphs, which are in full as follows (R. 33):

> "*It further appearing*, that the increase in fares proposed is necessary to meet, in part, increased operating expenses incurred or to be incurred by said petitioners because of the payment by them of (a) increased wages to employees, (b) increased cost of materials and supplies, and (c) additional expenditures to safeguard petitioners' properties and operations during the present emergency; the details of which will be stated in a report hereafter to be made respecting the proposed increased freight rates and charges;
>
> "And the Commission does hereby find that the increase in fares proposed is necessary to enable petitioners to continue to render adequate and efficient railway transportation service during the present emergency; and that, upon consideration of said petitions and the evidence of record, that the proposed increased fares will be reasonable and lawful."

The provisions of the order expressing its purposes and operative effect are as follows (R. 33-34):

> "*It is ordered*, That the increased passenger fares as proposed by the said petitioners be, and they are hereby, approved, provided that where the total increased fares are less than $1 fractions of less than one-half cent shall be dropped and fractions of one-half cent or greater may be increased to the next whole cent, and that where the total increased fares are more than $1 such fares shall end in 0 or 5, but no more than 2.5 cents shall be added to the present fares as increased by 10 per cent in order to make such total fares end in 0 or 5.

"*It is further ordered*, That all outstanding orders, as amended, of the Commission, authorizing or prescribing interstate and intrastate fares, or bases of fares, be, and they are hereby, modified, effective concurrently with the establishment of the increased fares herein approved, only to the extent necessary to permit the increase herein authorized to be added to the interstate and intrastate fares approved or prescribed in, or maintained or held by virtue of, said outstanding orders; and that a copy of this order shall be filed in the docket of each such proceeding, including those proceedings under section 13 of the Interstate Commerce Act enumerated in the order of February 28, 1936, in docket No. 26550, *Passenger Fares and Surcharges*.

"*It is further ordered*, That all tariffs or supplements changing fares by authority of this order, which are maintained or held by authority of outstanding orders of the Commission, shall bear on their title pages specific reference to this order.

"*It is further ordered*, That the increased fares herein authorized may be made effective upon not less than 10 days' notice to the Commission and to the general public by publishing, filing, and posting in the manner provided in section 6 of the Interstate Commerce Act; that a copy of this order be served on each of said petitioners and on the Governors of the several States.

"*And it is further ordered*, That jurisdiction be, and it is hereby, retained by the Commission, for the purpose of determining, if need be, the lawfulness of any particular fare or fares, resulting from this order.

"The Commission not yet having determined the remaining issues involved, namely, those relating to the rates and charges for the transportation of freight, and services connected therewith, and for the transportation of milk and cream, jurisdiction is hereby retained for the purpose of further consideration and determination of such other issues herein."

The complaint also refers to a supplemental report of

the Commission of March 2, 1942, and quotes therefrom the following language (R. 8):

> "Because of the abnormal conditions which now prevail throughout the country we are of the opinion that the increased fares proposed will yield substantial amounts of additional revenues, and that the passenger service justly and reasonably should contribute to meeting the added operating costs of the railroads.
>
> "In an appropriate order made in this proceeding on January 21, 1942, we found that the increase in fares proposed is necessary to enable the petitioners to continue to render adequate and efficient railway transportation service during the present emergency, and that the proposed increased fares will be reasonable and lawful. We therein approved the proposed increased fares subject to a suitable rule for the disposition of fractions stated in the order.
>
> "All our outstanding orders, as amended, authorizing or prescribing interstate and intrastate fares, or bases of fares, were modified by that order, effective concurrently with the establishment of the increased fares therein approved, to the extent necessary to permit the authorized increase to be added to the interstate and intrastate fares approved or prescribed in, or maintained or held by virtue of, such outstanding orders. We retained jurisdiction for the purpose of determining, if need be, the lawfulness of any particular fare or fares resulting from that order. Increased fares were filed and became effective February 10, 1942.
>
> "The foregoing findings as made in our order of January 21, 1942, are here renewed and affirmed."

The complaint and exhibits set forth no other matter in the nature of findings supporting the order. However, although the pleadings do not require either the defendants or this court to recur to portions of the report of March 2, 1942, not set forth in the complaint and not before the court, and although perhaps strict practice would not even permit us to search records not pleaded in order to find a

further basis upon which the order in question might be aided or supported, the defendants do not insist upon a technical attitude which would restrict the vision of this court to the letter of the complaint and its accompanying exhibits. The defendants have therefore independently examined the last mentioned report in quest of further matter in the nature of findings in support of the complaint. For the convenience of the court, and for such comfort as the report at large may afford the plaintiff in this case, the defendants quote, in an appendix to this statement, *all* of the recitals of the Commission in the report under the caption of

"Passenger Fares and Passenger Train Service."

Upon consulting these recitals, it will appear that the findings incorporated in the order proper are not substantially amplified. (Appendix B.)

SPECIFICATION OF SUCH OF THE ASSIGNED ERRORS AS ARE INTENDED TO BE URGED.

The defendants intend to urge the following errors assigned upon the record:

1. The court erred in not holding as a matter of law that the supposed and purported order of the Interstate Commerce Commission, dated January 21, 1942 (R. 32), mentioned above, was void because it was not supported either by the recitals in the text thereof or otherwise by adequate and sufficient findings of the facts upon which it was based.

2. The court erred in failing to hold that this supposed and purported order, even if valid according to its terms and purport, merely permitted the plaintiff to increase the rates in question, but that the order intended and contemplated that the plaintiff was nevertheless not exempted from the necessity of obtaining the sanction, authority or permission of the Illinois Commerce Commission before so increasing such rates.

Therefore the court erred in overruling the defendants' motion to strike the complaint, in entering the decree appealed from, and in not dismissing the plaintiff's complaint for want of equity and upon the merits (*Errors Assigned*, R. 62 and 63).

SUMMARY OF ARGUMENT.

I.

The Order of the Interstate Commerce Commission Entered January 21, 1942, Relied Upon by the Plaintiff as Authorizing the Increase of Rates in Question, Is Void for Want of Sufficient Findings of Fact.

State of Florida v. *United States*, 282 U. S. 194.

U. S. v. *Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499.

Wichita R. R. Co. v. *Public Utilities Commission*, 260 U. S. 48.

Atchison Ry. v. *United States*, 295 U. S. 193.

Panama Refining Co. v. *Ryan*, 293 U. S. 388.

U. S. v. *Louisiana*, 290 U. S. 71.

Georgia Comm. v. *United States*, 283 U. S. 765.

II.

Whether the Order of the Commission Is Valid or Invalid, It Does Not by Its Terms Purport to Do More Than Approve and Withdraw Federal Opposition From the Increased Rate Schedule; and It Is Still Incumbent Upon the Railroads to Procure Appropriate Authority From the States With Respect to Intrastate Rates.

Transit Commission v. *Long Island R. Co.*, 33 N. Y. S. (2d) 993.

C. R. I. & P. Ry. Co. v. *Arkansas*, 219 U. S. 453.

Atlantic Coast Line R. Co. v. *Georgia*, 234 U. S. 280.

Robbins v. *Shelby County Taxing District*, 120 U. S. 498.

ARGUMENT.

I.

The Order of the Interstate Commerce Commission Entered January 21, 1942, Relied Upon by the Plaintiff as Authorizing the Increase of Rates in Question, Is Void for Want of Sufficient Findings of Fact.

It is the first contention of the defendants that the order in question is clearly void when its terms are measured by the constitutional standards for the validity of such orders, as those standards have been repeatedly announced by this court. More particularly, the defendants maintain that the only recitals in the order assuming to state its basis in fact are precisely the sort of statements which have been consistently condemned by this court as wholly inadequate to impart validity to the acts of the Interstate Commerce Commission.

The decisions of this court to be cited and discussed hereafter established two cardinal principles applicable to this case:

First. The firmly established constitutional requisite of due process of law that orders of administrative boards must contain findings of fact, when that requirement is applied specifically to orders of the Interstate Commerce Commission in rate cases and like matters, is *not* met by the mere statement that a schedule of rates is "fair," "reasonable," "necessary to prevent unjust discrimination," or similar generalities of conclusion. On the contrary, the order must set forth, at very least in terms of approximation or estimate, the nature, extent, and proportion of the financial burden entailed upon the carriers by the service for which the rates are charged. In specific application to the instant case, it will be shown that the findings in the order relied upon by the plaintiff

are very similar to findings repeatedly denounced by this court in like cases.

Second. That an order which is unsupported by adequate findings is *void* and hence is vulnerable to collateral and independent attack in equity by the carrier, a shipper or consumer, or the state; so that if the present order is invalid for want of proper findings, the defendants may assail it in these proceedings.

The Findings in the Present Order.

The first two paragraphs of the order (R. 32) recite merely the initiation of the proceedings, the giving of notice, the conducting of hearings, and reception of evidence, and other matters of *procedural history*.

The only matter in the order which even assumes the form of a recital of facts supporting the terms of the order is the third and fourth paragraphs, which are in full as follows (R. 33):

> "*It further appearing*, That the increase in fares proposed is necessary to meet, in part, increased operating expenses incurred or to be incurred by said petitioners because of the payment by them of (a) increased wages to employes, (b) increased cost of materials and supplies, and (c) additional expenditures to safeguard petitioners' properties and operations during the present emergency; the details of which will be stated in a report hereafter to be made respecting the proposed increased freight rates and charges;
>
> "And the Commission does hereby find that the increase in fares proposed is necessary to enable petitioners to continue to render adequate and efficient railway transportation service during the present emergency; and that, upon consideration of said petitions and the evidence of record, that the proposed increased fares will be reasonable and lawful:"

The only other matter which assumes to state the basis for the order is the statement or commentary incorporated in the "report of March 2, 1942" but not in existence at

the time that the order was entered. This matter was not pleaded by the plaintiff and strictly is not accessible to the scrutiny of the court on the pleadings. However, the defendants have reproduced it in full as an appendix to this statement. (Appendix C.).

The following comment as to this additional matter is appropriate:

The supplementary material sets forth in some detail the previous schedule of fares, which schedule, of course, appears in prior orders of the Commission. Neither the order proper nor the report shows any of the following pertinent information:

1. The *total expense of passenger service* or the proportion of total expense of all railway service fairly allocable to passenger service upon a basis apportioning the cost of operating the entire railway system as between freight and passenger service is not set forth. Quite obviously, much equipment—such as tracks, signal and switching facilities, office and general quarters, and the like—as well as the services of many employees, must be used both for freight and passenger service. It is impossible to discover the basis upon which, in the language of the Commission, in Sheet 13 of the report of March 2,

> "the passenger service justly and reasonably should contribute to meeting the added operating costs of the railroad" (Appendix.)

2. Any estimate in terms of dollars and cents, passenger miles, or other terms, of the contemplated effect of the emergency upon passenger revenues. The language most nearly pertinent as a response to the problem of the effect of the emergency upon passenger traffic is the following:

> "Petitioners express confidence that the increase proposed will not curtail the travel volume, which they estimate will not be less in 1942 than it was in 1941. Business and economic conditions are more favorable for rail travel than in 1936 when the present maximum

basis of 3 cents in sleeping and parlor cars and 2 cents in coaches was prescribed by us. An important contributing factor is the recent curtailment of automobile production and a scarcity of rubber tires for automobiles." (Sheet 13 of the report.)

Thus, for aught that appears, the

"recent curtailment of automobile production and a scarcity of rubber tires for automobiles"

may not only

"not curtail the travel volume"

but may so vastly increase it as to render the increase in receipts under *present* rates lucrative to a degree out of all proportion to the increased cost of carrying passengers on cars already running but previously half filled, using stations already built, and otherwise exploiting the facilities and services already available and partially idle.

3. In short, it is quite impossible to discern, either in the text of the order proper or in the supplementary report, which was not available until after the order was supposed to be effective, what the Commission's findings and conclusions may be with respect to the impact of the national emergency upon the railroads. The order and report abound in generalities and categorical pronouncements to the effect that increased costs, wages and other expenses, as well as increase of business, will require increased revenues. But no one can tell how the Commission may have comparatively estimated the rise in wages and prices on the one hand, and the increase in the volume of business, on the other hand.

* * * * *

The court is now respectfully asked, on the one hand, to compare the language above quoted with recitals previously condemned by this court as insufficient to support a valid order; and on the other hand, to contrast that language with findings which *have* been held sufficient to satisfy the requirements of due process of law.

Cases Holding Orders Void for Want of Sufficient Findings and Subject to Collateral Attack in Equity.

The first case relied upon by defendants is that of

State of Florida v. *United States*, 282 U. S. 194.

In that case, as in the present case, the order under consideration was made by the Interstate Commerce Commission. Like the order in the present case, it provided for an increase of rates on intrastate commerce in order to equalize proportionately the burden to be borne by such commerce with that borne by interstate traffic. The findings of the Commission appear at pages 206-207 of the official reporter and are quoted in full in the margin of this statement.*

It will be observed that in the *State of Florida case*, the Commission found in substance that the prevailing rates were

"unreasonable to the extent that they exceeded",

the prescribed new rates; that they would

"result in undue preference and advantage of shippers of intrastate traffic, * * * shippers of interstate

* "We find that the interstate rates on logs, except walnut, cherry and cedar, in carloads, from points on defendant's lines in Florida north of and including Jacksonville, Gainesville, Burnett's Lake, and High Springs, to destinations on its lines in Georgia for distances not exceeding 170 miles are, and for the future will be, unreasonable to the extent that they exceed, or may exceed, the following distance scale of rates in cents per 100 pounds, minimum weight 40,000 pounds, which rates we find are and will be reasonable" (inserting schedule) * * *.

"We further find that the Florida intrastate rates assailed, which are lower than the interstate rates herein found reasonable for corresponding distances, result, and will result, in undue preference and advantage of shippers of intrastate traffic within the State of Florida, in undue prejudice to shippers of interstate traffic from points in the State of Florida to points in the State of Georgia, and in unjust discrimination against interstate commerce.

"We further find that said undue preference and advantage, undue prejudice, and unjust discrimination can and should be removed by the establishment of rates for intrastate application within Florida which shall correspond with the rates herein found reasonable for interstate application from Florida to Georgia.

"We further find that whether the aforesaid rates pertain to transportation in interstate commerce or to transportation in intrastate commerce the transportation services in each instance are performed by defendant under substantially similar circumstances and conditions."

> traffic from points in * * * Florida to points in * * * Georgia, and in unjust discrimination against interstate commerce";

and that such

> "undue preference and advantage * * * should be removed by the establishment"

of the rates fixed by the order.

(It will be recalled that in the order in the *instant* case the Commission found that the increase in fares

> "is necessary to meet, in part, increasing operating expenses * * * because of * * * (a) increasing wages to employees, (b) increasing costs of materials and supplies, and (c) additional expenditures to safeguard petitioner's properties and operations during the present emergency" (R. 33),

and that the increase

> "is necessary to enable petitioners to continue to render adequate and efficient railway transportation service during the present emergency" (R. 33),

it being further stated

> "that the proposed increase in fares will be reasonable and lawful" (R. 33).

The instant order contains no more specific findings.)

This court that the order was invalid and subject to collateral attack in equity by the State of Florida because the findings were insufficient. The court said at page 215:

> "The question is not merely one of the absence of elaboration or of a suitably complete statement of the grounds of the Commission's determination, to the importance of which this court has recently adverted (*Beaumont, Sour Lake & Western Railway Co.* v. *United States*, decided November 24, 1930, 282 U. S. 74, 51 S. Ct. 1, 75 L. Ed. 221), but of the lack of the basic or essential findings required to support the Commission's order. *In the absence of such findings, we are not called upon to examine the evidence in order to resolve opposing contentions as to what it shows or to spell out and state such conclusions of fact as it may permit.* The Commission is the fact-

finding body, and the Court examines the evidence not to make findings for the Commission but to ascertain whether its findings are properly supported. If the facts as to intrastate transportation of logs in Florida are such as to justify an order as to intrastate rates in order to end an unjust discrimination as against interstate commerce either as between persons and localities, or because of an undue burden upon the revenues of the carrier, the Interstate Commerce Commission is still at liberty, acting in accordance with the authority conferred by the statute, to make such determinations as the situation may require.

"We conclude that the portion of the order of the Commission which is now under review, with respect to intrastate rates, is not supported by the findings of the Commission and this part of the order must be set aside." (Emphasis supplied.)

Another decision immediately applicable to the present case is that of

U. S. v. Chicago, M., St. P. & P. R. Co., 294 U. S. 499.

That case involved the validity of an order of the Interstate Commerce Commission in respect to interstate and intrastate rates for the shipment of coal in the Illinois and Indiana coal fields. In that case the Commission refused to approve a schedule of tariffs increasing the rates, so that its ruling was adverse to the carrier. There it was the railroad, not the state, which complained of inadequate findings. The recitals in question appear at page 505 of the official report and are set forth in full in the margin.*

* "We find that the proposed rates if permitted to become effective would lead to a disruption of the rate structure on coal in the Indiana and related areas, thus impairing the revenue of the carriers serving those areas and their ability to provide the adequate and efficient transportation service contemplated by section 15a of the act; that they would cause a disruption of the individual groups from which the rates are proposed; and that they would cause a disruption of the long-standing rate relation existing for competitive purposes, between the several Indiana groups.

"We find that the proposed rates would be unreasonable and in violation of sections 1(5) (which denounces unreasonable charges) and 15a (2) of the act (which has been summarized above)."

Again affirming its adherence to the constitutional principle requiring that orders of administrative boards be sustained by adequate findings and making clear that evidence without findings is as impotent to sustain such an order as would be findings without evidence in the record, this court said at page 504:

> "This court has held that an order of the Interstate Commerce Commission is void unless supported by findings of the basic or *quasi*-jurisdictional facts conditioning its power. *Florida* v. *United States*, 282 U. S. 194, 215; *United States* v. *Baltimore & Ohio R. Co.*, 293 U. S. 454. 'In the absence of such findings, we are not called upon to examine the evidence in order to resolve opposing contentions as to what it shows or to spell out and state such conclusions of fact as it may permit.' *Florida* v. *United States, supra.* Orderly review requires that this objection, being basic and jurisdictional, be disposed of at the beginning."

Applying this principle to the findings of that case, this court said further at page 507:

> "There is not a fact stated in the report to indicate that it will be unjust or impracticable to apply the new Milwaukee rates to the other lines in Indiana after increasing them by the differentials hitherto prevailing. There is not a fact to indicate that the rates so reduced will be less than compensatory or that capacity for service to the public will be impaired or put in jeopardy. 'The raising of rates does not necessarily increase revenue. It may in particular localities reduce revenue instead of increasing it, by discouraging patronage.' *Florida* v. *United States, supra*, at p. 214."

We ask the court's especial attention to the following statement at page 508:

> "*At the very least the findings should inform us, if only approximately, of the extent of the expected loss;* they should make it clear whether the impairment of revenues will be trivial or substantial, for only thus can the impairment be related to capacity for service. Cf. *Florida* v. *United States*, 292 U. S. 1, 9."

The similarity between the findings in that case and those in the instant case is very striking. In the cited case there was a finding that the rates would result in

> "impairing the revenue of the carriers * * * and their ability to provide the adequate and efficient transportation service contemplated by section 15a of the act."

In the instant case the recital of the Commission most nearly resembling in its content the finding of a substantial fact is the declaration that

> "the increase in fares proposed is necessary to enable petitioners to continue to render adequate and efficient railroad transportation service during the present emergency" (R. 33).

Thus the essential substance of the findings in the *Chicago and Milwaukee case* last above cited is identical with that of the findings in the present case.

Another utterance of this court declaring the requirement of adequate findings to be constitutional and of the essence of due process of law is that to be found in the case of

> *Wichita R. R. Co.* v. *Public Utilities Commission*, 260 U. S. 48.

The court said at page 58:

> "This conclusion accords with the construction put upon similar statutes in other States. *Public Utilities Commission* v. *Springfield Gas & Electric Co.*, 291 Ill. 209; *Public Utilities Commission* v. *Baltimore & Ohio Southwestern R. R. Co.*, 281 Ill. 405. Moreover, it accords with general principles of constitutional government. The maxim that a legislature may not delegate legislative power has some qualifications, as in the creation of municipalities, and also in the creation of administrative boards to apply to the myriad details of rate schedules the regulatory police power of the State. The latter qualification is made necessary in order that the legislative power may be effectively exercised. In creating such an administrative agency

the legislature, to prevent its being a pure delegation of legislative power, must enjoin upon it a certain course of procedure and certain rules of decision in the performance of its functions. It is a wholesome and necessary principle that such an agency must pursue the procedure and rules enjoined and show a substantial compliance therewith to give validity to its action. *When, therefore, such an administrative agency is required as a condition precedent to an order, to make a finding of facts, the validity of the order must rest upon the needed finding. If it is lacking, the order is ineffective.*" (Emphasis supplied.)

In the case of

Atchison Ry. v. United States, 295 U. S. 193,

this court held that an order of the Interstate Commerce Commission purporting to regulate yardage charges was invalid for want of adequate findings. That case was an important one in its bearings upon the economics of transportation. The question presented to the Commission in the proceedings was whether certain services relating to the penning and care of livestock were a final part of the services of the railway as a carrier or were the first phase of the course of commerce after railway transportation had ceased, the livestock being regarded as having been delivered to the consignee so that the services in question were not rendered by the railway as a carrier, but as an additional service for which an extra charge could be made. The purely general and therefore insufficient character of the findings sufficiently appears from the language in which the court pronounces them inadequate to support a valid order. The court said at page 201:

"But the Commission, in respect of the shipments covered by its order, made no definite finding as to what constitutes complete delivery or where transportation ends. Its report does not disclose the basic facts on which it made the challenged order. This court will not search the record to ascertain whether,

by use of what there may be found, general and ambiguous statements in the report intended to serve as findings may by construction be given a meaning sufficiently definite and certain to constitute a valid basis for the order. In the absence of a finding of essential basic facts, the order cannot be sustained. *Florida v. United States*, 282 U. S. 194, 215. *Recently this court has repelled the suggestion that lack of express finding by an administrative agency may be supplied by implication. Panama Refining Co. v. Ryan*, 293 U. S. 388, 433. See *Beaumont, S. L. & W. Ry. v. United States*, 282 U. S. 74, 86. *Interstate Commerce Comm'n. v. Chicago B. & Q. R. Co.*, 186 U. S. 320, 341."

The cases above considered all deal with orders of the Interstate Commerce Commission with the exception of the case of *Wichita R. R. Co. v. Public Utilities Commission*, which involved the order of a state public service commission. Counsel writing this brief perceive no occasion for multiplying citation of other cases of this court and the many decisions of federal and state courts which similarly emphasize as indispensable the requirement that the orders of administrative boards, tribunals and commissions be supported by adequate findings.

However, in concluding our discussion of authorities holding such orders invalid in the absence of such findings, we briefly refer the court's attention to the leading case of

Panama Refining Co. v. Ryan, 293 U. S. 388.

In that case this court, speaking through Mr. Chief Justice Hughes, pronounced invalid the executive order of the President prohibiting the transportation in interstate and foreign commerce of "hot oil and petroleum products," that is, oil and petroleum products produced or withdrawn from storage in excess of prescribed quotas. Neither economic crisis, social emergency, nor the prestige of the Chief Executive was permitted to absolve the order from the requirements of due process of law, or to warrant a

dispensation from constitutional principles. The court said at page 431:

> "There is another objection to the validity of the prohibition laid down by the Executive Order under § 9 (c). The Executive Order contains no finding, no statement of the grounds of the President's action in enacting the prohibition. Both § 9 (c) and the Executive Order are in notable contrast with historic practice (as shown by many statutes and proclamations we have cited in the margin) by which declarations of policy are made by the Congress and delegations are within the framework of that policy and have relation to facts and conditions to be found and stated by the President in the appropriate exercise of the delegated authority."

The court further said at page 432:

> "As the Court said in *Wichita Railroad & Light Co.* v. *Public Utilities Comm'n.*, 260 U. S. 48, 59: 'In creating such an administrative agency the legislature, to prevent its being a pure delegation of legislative power, must enjoin upon it a certain course of procedure and certain rules of decision in the performance of its function. It is a wholesome and necessary principle that such an agency must pursue the procedure and rules enjoined and show a substantial compliance therewith to give validity to its action. *When, therefore, such an administrative agency is required as a condition precedent to an order, to make a finding of facts, the validity of the order must rest upon the needed finding. If it is lacking, the order is ineffective.* It is pressed on us that the lack of an express finding may be supplied by implication and by reference to the averments of the petition invoking the action of the Commission. We cannot agree to this.' Referring to the ruling in the *Wichita case*, the Court said in *Kahler* v. *Eby*, 264 U. S. 32, 44: 'We held that the order in that case made after a hearing and ordering a reduction was void for lack of the express finding in the order. We put this conclusion not only on the language of the statute but also on general principles of constitutional government.'"

Cases Holding Findings Sufficient to Support Orders Entered Thereon.

In order incisively to demonstrate the inadequacy of the findings embodied in the present order, the defendants now ask the court briefly to consider cases in which the findings of administrative commissions *have* been pronounced sufficient to sustain orders based thereon. An examination of such cases will indicate immediately the marked contrast between the character of those findings which have been *approved* and those in the instant case; and it will be readily perceived that the findings in the instant order are indistinguishably similar in substance to the orders condemned (cases cited, *ante*) but vastly different in character from those which have been sustained.

It should be here observed that the defendants have not selected cases in which the findings were virtually perfect merely in order to make more vivid the distinction between the findings in the instant order and those which have been pronounced sufficient or simply to enhance the contrast. On the contrary, we have selected the cases in which, even though the findings have been approved, they have been criticized and censured.

Such a case is that of

U. S. v. Louisiana, 290 U. S. 71.

In that case, the order was seriously assailed on the ground that the findings were inadequate by the State of Louisiana. A district court of three judges acceded to the argument attacking the order and held that the findings were insufficient to support the order.

This court, speaking through Mr. Justice Stone, criticized the findings, but concluded that they contained sufficient substance of fact to support the order.

That case, like the present case, involved an order prescribing an increase in intrastate rates. But in that case,

the Commission (incorporating by reference the findings in collateral proceedings) found that

> "the plan outlined in the appendix we estimate will produce between one million and one hundred and twenty-five million dollars' increased revenue on the basis of present traffic, if applied both state and intrastate."

Summarizing the substantial content of the findings, the court said at page 80:

> "There are no formal requirements for the findings to be made by the Commission in this type of case, see *Manufacturers Ry. Co.* v. *United States*, 246 U. S. 457, 490, and while the particular form in which they were cast here is not to be commended, the report, read as a whole, sufficiently expresses the conclusion of the Commission, *based upon supporting data, including estimates of experienced railroad traffic men, to which the report refers,* that the probability of increased revenue was sufficiently great to make the increase of rates a reasonable exercise of sound managerial judgment. This, we think, meets the requirements of the statute." (Emphasis supplied.)

It will be observed that even when it affirmatively appeared from the order that

> "the conclusion of the Commission, based upon supporting data, including estimates of experienced railroad traffic men, *to which the report refers,*"

the court held that even these findings were

> "not to be commended."

Apparently this case indicates the limit to which the Commission may go in generality without incurring condemnation more severe than adverse criticism.

The court in the *Louisiana case* last cited *distinguishes* the case of *Florida* v. *The U. S.*, 282 U. S. 194, first cited by defendants in the present brief, in the following language at page 79:

> "A question different from that before us was presented in *Florida* v. *United States, supra.* There the

discrimination was essentially one of undue prejudice against shippers, confined by the evidence to rates prevailing in northern Florida. It involved only one railroad and one commodity. It was not the general revenue proceeding authorized by § 15a. The Court was careful to point out that the Commission had undertaken to establish a statewide level of intrastate rates *without any findings with respect to the corresponding interstate traffic which would tend to support the conclusion that a state-wide alteration of intrastate rates was necessary to protect the interstate commerce* involved." (Emphasis supplied.)

Another case indicating the sort of findings which have been upheld by this court is

Georgia Comm. v. *United States*, 283 U. S. 765.

The court said at page 773:

> "*Third.* The appellants contend that the order is void because there are no adequate findings of undue disparity between the rates charged for intrastate transportation in Georgia and the rates actually in force for interstate transportation; and also because there was no finding that the intrastate rates imposed an undue burden upon the carriers' interstate revenues or that the alteration of the intrastate rates would produce additional revenue. The findings in the report are definite and comprehensive. *There are, moreover, illustrative specific findings which confirm the general ones and show that in a real sense, and to a substantial degree, undue prejudice and discrimination to interstate shippers and localities have resulted and will result.*" (Emphasis supplied.)

From the language emphasized above, it appears that there were

> "illustrative specific findings which confirm the general ones"

and that it appears

> "in a real sense, and to a substantial degree, undue prejudice and discrimination"

would result. No such demonstrative material is to be found in the order in the present case.

The Application of the Foregoing Authorities to the Findings in the Instant Case.

The defendants now ask the court to note the immediate force of the decisions considered above in the instant case.

In the case of *U. S.* v. *Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499, this court in speaking of the findings of the Commission, said at page 507:

> "There is not a fact to indicate that the rates so reduced will be less than compensatory, or that capacity for service to the public will be impaired or be in jeopardy."

This observation was made notwithstanding a purported "finding" in general terms that the proposed rates would result in

> "impairing the revenue of the carriers * * * and their ability to provide the adequate and efficient transportation service contemplated by section 15a of the act."

In the instant case there is no finding of fact showing that the rates before the authorized increase were confiscatory (R. 32-33).

In the same case the court said at page 508:

> "At the very least the findings should inform us, if only approximately, of the extent of the expected loss."

There is not a word in the findings in the instant case to indicate the "extent" of the inadequacy of the previous rate structure of the "expected loss" or deficit to be anticipated from the previous rates (R. 33-34).

In that case this court expressly condemned the mere pronouncement that

> "the proposed rates would be 'unreasonable,'"

characterizing such pronouncement as

> "a conclusion insufficient as a finding unless supported by facts more particularly stated."

In the present order there is merely the finding that the

> "proposed increased fares will be reasonable and lawful" (R. 33).

In *State of Florida* v. *United States*, 282 U. S. 194, this court similarly pronounced insufficient a mere purported finding that the rates were "unreasonable" and would

> "result in undue preference and advantage to shippers of intrastate traffic,"

and that such

> "undue preference and advantage * * * should be removed"

by the establishment of the rates fixed by the order.

It is respectfully submitted that upon no rational theory can a decision sustaining as valid the order in the instant case be reconciled either with the general principle requiring adequate findings as indispensable to due process of law, or with the clear and specific application of that principle by this court in cases immediately apposite to the instant case.

An Order Invalid for Want of Sufficient Findings Is Subject to Collateral Attack in Equity.

It will be noted that the cases heretofore cited, in which orders of the Interstate Commerce Commission were held invalid, were independent proceedings in equity. It was held without question that the enforcement of a void order would be enjoined in equity. If equity will affirmatively *enjoin* the execution of a void order, necessarily it will refuse its active aid in upholding such an order.

II.

Whether the order of the Commission is valid or invalid, it does not by its terms purport to do more than approve and withdraw federal opposition from the increased rate schedule; and it is still incumbent upon the railroads to procure appropriate authority from the states with respect to intrastate rates.

Under Point I of this statement it was argued that the order of the Interstate Commerce Commission is invalid for want of sufficient finding to support its provisions. If that contention is sound, the plaintiff's case necessarily fails; and the considerations developed under the present Point are academic.

Under the present Point, the defendants urge an independent and distinct objection to the plaintiff's complaint.

The defendants maintain that, without regard to the validity or invalidity of the order, it purports to do no more than remove any restraint existing by virtue of previous orders of the Commission upon the railways of the nation so as to permit them, without federal interference, to seek authority from state legislatures, commissions, or other appropriate agencies for the proposed increase in fares.

In the only decision construing the present order of which the defendants are aware, it was held and, we submit, convincingly demonstrated that the instant order does *not* relieve the railroads of the necessity of procuring state approval for the proposed increase in rates; but that its only effect, even if it is valid, is to express federal consent to the increase.

The case to which defendants refer is *Transit Commission* v. *Long Island R. Co.*, decided by the Supreme Court of New York (Hofstadter, *J.*) on March 6, 1942, 33 N. Y. S.

(2d) 993. For the convenience of the court this opinion is reproduced in full as Appendix A to this brief.

In that case the Transit Commission and the City of New York sued to restrain the defendant railroad companies from putting into effect the increased schedule of intrastate passenger rates contemplated by the order involved in this case. It was admitted that the railroads had not procured state authorization for the increase in rates; but the defendant railroads contended there, as the plaintiff contends here, that the Interstate Commerce Commission had established the increased schedule of rates and had thereby superseded previous tariffs.

The opinion is carefully reasoned and very well expressed. The court recognized, as do the defendants in the present case, that there is no question that the Interstate Commerce Commission has the authority to raise intrastate rates in order to protect interstate commerce. The court, however, reached the conclusion that the Commission *did not intend to exercise that authority*, but that on the contrary, the sole purpose of the order was to withdraw federal opposition to the increase, if the states acceded to requests for such increase.

The substance and import of the argument leading to this conclusion may be thus briefly indicated:

It is, of course, axiomatic that the states are free to control commerce unless and until the federal sovereign, either through congressional enactment or administrative regulation, actually exercises its supreme power over "commerce among the several states." (*C. R. I. & P. Ry. Co.* v. *Arkansas*, 219 U. S. 453; *Atlantic Coast Line R. Co.* v. *Georgia*, 234 U. S. 280; *Robbins* v. *Shelby County Taxing District*, 120 U. S. 498.)

It is to be supposed that if the government of the United States desires to enforce upon the states, the public and

the carriers a vast and comprehensive program of rate or other regulation, it will do so in unmistakable terms.

Not only does the present order fail to use language explicitly and unequivocally expressing an intent to accomplish so important and far-reaching a result as the abrogation of all intrastate rates theretofore existing, but the wording of the order, although doubtless ambiguous, is pregnant with the implication of a contrary intent.

The New York court said on pages 998-999:

"The order of January 21, 1942, contains this provision: 'It is further ordered, that all outstanding orders, as amended, of the Commission, authorizing or prescribing interstate and *intrastate fares*, or bases of fares be, and they are thereby modified, effective concurrently with the establishment of the increased fares herein approved, only to the extent necessary to permit the increase herein authorized, to be added to the interstate and intrastate fares approved or prescribed in, or maintained or held by virtue of said outstanding orders.

. . . . . .

"This provision, standing altogether by itself, would lend strong support to the claim of the respondents that the Interstate Commerce Commission had intended to increase intrastate rates. Why amend orders dealing with intrastate rates if there was no intention to deal with them? But the provision quoted must be read in the light of the entire order, its preambles as well as its directing provisions. Thus read, it becomes clear that the purpose of the quoted section of the order is merely to render possible action by the state regulatory bodies, to approve similar increases in intrastate rates. In its first preamble the order refers to the fact 'that proper authorities of all states have been notified of this proceeding and *similar* application has been *or will be* made to the regulatory of the respective states for *permission* to increase *similarly* petitioners' *intrastate* rate fares and charges.' In the light of this recitation, it is obvious that in this aspect no more was intended by the order

than to lift any restrictions that might exist barring applications to state regulatory bodies for permission to increase intrastate rates." (Emphasis of the court.)

In approaching the conclusion above expressed, the court considered the findings not merely inadequate to support the order as a valid interference with rates fixed by state commissions, but as evincing an intent *not* to supersede state regulations and as showing, on the contrary, no purpose other than to approve the new rates so far as federal authority was concerned and to sanction alteration of existing rates by state bodies. The court said on pages 997-998:

> "The power of the Interstate Commerce Commission in the premises, thus, cannot be brought in question; nor have the petitioners sought to do so. But the power of the Interstate Commerce Commission to regulate intrastate rates depends upon a finding by it that there exists an unfair discrimination against interstate commerce; and this determination must be based on evidence conforming to a high standard of certainty (*Chicago & North Western Railway Co.* v. *Rockwell Lime Co.*, 373 Ill. 309, cert. den. 311 U. S. 660). In determining whether the orders of the commission relied upon by the respondents actually purport to fix intrastate rates, it is appropriate to bear this rule in mind."
>
> * * * * *
>
> "It is undoubtedly true, as was pointed out by the Supreme Court of the United States in *Railroad Commission of Wisconsin* v. *Chicago B. & Q. R.R.* (257 U. S. 563), that if the railroads are to earn a fixed net percentage of income, the lower the intrastate rates, the higher the interstate rates may have to be, and that the Transportation Act of 1920 may be said to have adopted the policy that the effective operation of the act 'will reasonably and justly require that intrastate traffic should pay a fair proportion of the cost of maintaining an adequate railway system' (*supra*, p. 588). But this is far from saying that the intrastate rates and the interstate rates must be on a parity. The problem of determining what is a fair proportion

of the burden that should be borne by intrastate traffic is one which the Interstate Commerce Commission is required to deal with, and its decisions must be based on finding that low rates for intrastate commerce would constitute an unfair burden on interstate commerce."

In other words, the New York court did not, upon a consideration of the findings, regard them as merely insufficient to support an order installing a new rate structure. On the contrary, the court's reading of the findings convinced it that *it was not even the intent* of the Commission to attempt such comprehensive and far-reaching revision of the rate structure of the country.

Let us observe the terms of the order itself.

In the first paragraph of the recitals the Commission states that

"the petitioning class II and class III railway companies of the United States, and certain other railway companies therein mentioned, and by petition dated December 16, 1941, certain common carriers by water engaged in the transportation of passengers, **seek authority** to increase by 10 percent their freight rates and charges, with certain exceptions not necessary to describe herein, * * *." (Emphasis supplied.)

In this same paragraph the Commission in the following highly significant language recites that it appears that

"similar application has been or will be made to the regulatory authority of the respective states for permision to increase similarly petitioners' intrastate rates, fares, and charges;"

The first paragraph immediately following the recitals merely provides that

"the increased passenger fares as provided by the said petitioners be and they hereby are **approved**,"

the remainder of the paragraph being concerned entirely with provisions where the fare results in a fraction of a cent, or an odd number of cents, where the fares are more than a dollar.

The second paragraph provides that

> "All outstanding orders as amended of the Commission authorizing **or prescribing** interstate and intrastate fares or bases of fares be and they are hereby modified . . . only to the extent necessary to **permit** the increase herein authorized."

Thus the Commission authorizes that rates **prescribed** be modified so as to **permit** the increase in charges.

The remaining three paragraphs of the order merely require tariffs or supplements to refer to the order, provide that increased fares may be made effective upon not less than ten days' notice to the Commission and the public, and retain jurisdiction

> "for the purpose of determining, if need be, the lawfulness of any particular fare or fares resulting from this order."

Surely the Interstate Commerce Commission, conscious of the very powerful influence upon the national economy which would necessarily result from a flat ten per cent increase upon railroad fares throughout the nation, if it intended to command such an increase, would use language unambiguous in meaning and imperative in mood to accomplish its result. It would certainly preface such language with the detailed and specific findings inexorably required by due process of law and the repeated admonitions of this court.

The defendants, therefore, contend that it was not the purpose and is not the effect of the order to impose upon the country a mandatory increase in rates. On the contrary, as the Supreme Court of New York has already observed, the import of the order must be determined by the tenor of the language; and the language does no more than grant the sufferance of the Commission to an increase in rates, provided that the states in turn permit such an increase.

Concluding Observations.

The authority of the Interstate Commerce Commission over the rates of public carriers, both among the several states and within the confines of those states, bestows upon it vast power over the resources of the nation. Such power is granted to it only because public necessity imperatively so requires. But with the necessity for power goes the utmost necessity for the observance of constitutional principles. Unless this precepts defining due process of law are scrupulously attended to, the primary purpose of that power, which is a just and orderly superintendence over the affairs of the nation, will be frustrated.

If it was intended the intent of the Commission to visit upon the nation a blanket ten per cent increase in the cost of transportation, the Commission should have found, at least in terms of estimates and approximations, a factual basis for that increase. It should have at least appraised, if it could not positively compute, in reasonably concrete terms the factors of increased cost and wages; and it should have found their proper relation to revenue resulting from the great press of increased business. In short, the Commission should have obeyed the principles laid down in the cases cited and should have made findings in conformity with those principles. It should then have made its order in unmistakable terms.

But the defendants contend that it was not the purpose of the order in the present case to make mandatory the increase in rates. When the order is construed merely as permitting the railroads to petition the state for an increase of fares, then the findings, although doubtless subject to criticism, might be sufficient to support an order merely permissive in intent; and the order may be given effect, according to its terms.

The defendants therefore contend that the order should be construed as merely permissive; but that if it is interpreted as mandatory, then it is invalid.

Respectfully submitted,

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Of Counsel.

APPENDIX A.

Full text of the opinion in the case of *Transit Commission*, being the Metropolitan Division of the Department of Public Service, petitioner, and *The City of New York*, intervenor-petitioner, v. *The Long Island Railroad Company, The Staten Island Rapid Transit Railway Company* and *The New York Central Railroad Company*, respondents, 33 N. Y. S. (2d) 993.

Supreme Court, New York County,
Trial Term, Part IX.

Commerce—Interstate and Intrastate Railroad Rates—Effect of Order of Interstate Commerce Commission.

(Editorial syliabus)

The order of the Interstate Commerce Commission, made January 21, 1942, for an increase of interstate rates of railroads, does not direct a similar increase of intrastate rates nor is such a direction to be inferred from its provisions or from earlier orders of the Commission. A state state court, though it has no power to set aside an order of the Commission, has jurisdiction to determine whether an order justifies an increase in intrastate rates. Such increase not being justified by the order, and authority therefor not having been obtained from the state regulatory body, a temporary injunction against an increase of intrastate rates should be made permanent. Doubts remaining which may be removed by further clarifying orders of the Commission, the decree should provide that either party may apply for a modification or vacating thereof on the presentation of such further orders.

Transit Commission, being the Metropolitan Division of the Department of Public Service, petitioner, and *The*

City of New York, intervenor-petitioner, v. *The Long Island Railroad Company, The Staten Island Rapid Transit Railway Company* and *The New York Central Railroad Company*, respondents.

Decided March 6, 1942.

George H. Stover, by Philip Hodes, John J. Bennett, Jr., by H. F. R. Mulligan; William C. Chanler, by Herman Horowitz, for petitioners.

Louis J. Carruthers for Long Island Railroad Company; Crabath, DeGersdorff, Swaine & Wood, by Jesse C. Millard, for Staten Island Railroad Company; Clive C. Handy, by T. P. Healy, for New York Central Railroad Company; Martin Conboy, of counsel for all respondents.

HOFSTADTER, *J.*—This is a special proceeding commenced by the Transit Commission, as petitioner, and the City of New York, as intervening-petitioner, against The Long Island Railroad Company, The Staten Island Rapid Transit Railway Company and The New York Central Railroad Company, as respondents. The Attorney-General of the State of New Work has appeared under section 62 of the Executive Law. The petition alleges that the respondents have not complied with section 29 of the Public Service Law, which prohibits any change in rates without the prior approval of the state regulatory body. It has been conceded that such approval has not been obtained and that section 29 has not been complied with. The petitioners invoke the provisions of section 57 of the Public Service Law of the State of New York, which authorizes a proceeding in such case, and seek an injunction to restrain the respondents from carrying out their expressed purpose of raising by 10 per cent. passenger rates charged by them in intrastate traffic.

The respondents contend, however, that an order of the Interstate Commerce Commission, promulgated on the 21st day of January, 1942, permitting an increase of rates of 10 per cent on the part of the petitioning Class I railroads applies to the intrastate as well as to interstate rates of the respondents; and that as a result of this order, the respondents are obliged to increase their intrastate rates so as to make them accord with the authorized interstate rates without the necessity for further recourse to the Transit Commission. It is further argued that this court is without jurisdiction to pass upon the problems presented, inasmuch as exclusive right to deal with orders of the Interstate Commerce Commission of this character has been conferred by Congress upon the federal district courts (Judicial Code, sec. 208, 28 U. S. C. 46).

There can be no question that if this proceeding involves to any extent an effort to "enjoin, set aside, annul or suspend any order of the Interstate Commerce Commission" (sec. 46, *supra*), the only forum in which it might be heard in the first instance is the District Court of the United States. But, the respondents' contention that only the United States courts have jurisdiction after the I. C. C. has made a determination (28 U. S. C. A., sec. 46) depends upon the prior finding of fact that the order of the I. C. C. actually did affect intrastate rates in this state" (Mr. Justice Rosenman, on the application for a temporary injunction, 107 N. Y. L. J., 647, February 11, 1942). Likewise, the refusal by Mr. Justice Eder to grant the application for removal to the federal court recognized that as a preliminary to invoking section 46 of the Judicial Code, it was necessary to determine whether an order of the Interstate Commerce Commission is being reviewed, or if, on the other hand, a statute of this state is sought to be enforced.

Indeed, the Supreme Court of the United States has indicated that suit to enjoin the increase of intrastate

rates on the ground that the increase is prohibited by state laws may be maintained in the state courts even when it is claimed in the answer that an order of the Interstate Commerce Commission requires the increase in question (*American Express Co.* v. *South Dakota ex rel. Caldwell*, 244 U. S. 617-628). In upholding the jurisdiction of the state court the court said:

> "If this were a proceeding professedly 'to enjoin, set aside, annul, or suspend' an order of the Commission 'in whole or in part,' a state court would obviously have no jurisdiction. The bill does not purport to attack, nor does it even refer to any such order. It alleges only that the express companies propose 'increases and advances' in charges for intrastate transportation, by introducing 'existing interstate rates.' It is the answer which sets up the order of the Commission as a justification; and plaintiffs deny that it is such."

The argument of the respondents comes to this: That as a result of the history of the rate regulation of these respondents by the Interstate Commerce Commission, these respondents are required, under relevant orders of that commission, to maintain their intrastate rates at the same level as the rates fixed by the commission for interstate commerce; and that, in any event, reading the order of the commission of January 21, 1942, in the context of the history of the rate regulation of these respondents, it is plain that the respondents are required to increase their rates on intrastate traffic by ten per cent. If this position were sound it would follow that this court is without jurisdiction to deal with the matter and that the injunction must be denied. On the other hand, if an examination of the relevant matters manifest that there is no obligation on the respondents, by virtue of any order or orders of the Interstate Commerce Commission, to increase the respondents' intrastate rates, at the present time, their power and right to do so would necessarily

depend upon their first obtaining the approval of the state regulatory bodies (Public Service Law, sec. 29); and since, concededly, no such approval has in fact been obtained, it would follow that the injunction requested must issue.

Ever since the Shreveport case (234 U. S. 342), it has not been open to doubt that Congress has the power to authorize the Interstate Commerce Commission to fix intrastate rates where such action is necessary to prevent interference with interstate commerce. In 1920, by a general amendment to the Interstate Commerce Act, Congress specifically authorized the Interstate Commerce Commission to fix intrastate rates whenever the commission after full hearings, "finds that any such rate, fare, charge, classification, regulation or practice causes any undue or unreasonable advantage, preference or prejudice as between persons or localities in intrastate commerce, on the one hand, and interstate or foreign commerce on the other hand, or any undue, unreasonable or unjust indiscrimination against interstate or foreign commerce" (49 U. S. C. A., sec. 13, 141).

The power of the Interstate Commerce Commission in the premises, thus, cannot be brought in question; nor have the petitioners sought to do so. But the power of the Interstate Commerce Commission to regulate intrastate rates depends upon a finding by it that there exists an unfair discrimination against interstate commerce; and this determination must be based on evidence conforming to a high standard of certainty (*Chicago & North Western Railway Co.* v. *Hockwell Lime Co.*, 373 Ill. 309, cert. den., 311 U. S. 660). In determining whether here, the orders of the commission relied upon by the respondents, actually purport to fix intrastate rates, it is appropriate to bear this rule in mind.

This history of the rate regulation of these respondents by the Interstate Commerce Commission since the Inter-

state Commerce Act of 1920 may be briefly recounted. On July 29, 1920 by an order—pursuant to section 15 (a) of the act, in a proceeding entitled *Ex Parte* 74 (58 I. C. C. 220) —the commission authorized a general increase in interstate passenger fares by 20 per cent. The New York State rate regulatory authority declined, however, to permit an increase of intrastate rates to conform with the increased interstate rate. A proceeding, initiated by the railroads before the Interstate Commerce Commission pursuant to section 13, subdivisions 3 and 4 of the Interstate Commerce Act, resulted in the determination by the commission that the maintenance of the lower rate in intrastate commerce by the State of New York was an unfair discrimination against interstate commerce; and by order dated November 13, 1920 the respondents, among others, were directed to "cease and desists" from continuing the lower rate in intrastate commerce on the ground that such conduct would constitute unjust discrimination against interstate commerce. Though that order explicitly prevented the respondents from maintaining a lower rate in intrastate commerce than that directed for them in interstate commerce, nothing that has been called to my attention justifies the conclusion that either the report of the Interstate Commerce Commission in that proceeding of the order based upon it, established the general principle that intrastate rates must always conform with interstate rates. Indeed, it is exceedingly doubtful whether the commission has power to adopt such a principle of construction and thus dispense with the need for a specific finding in each case that the maintenance of a lower intrastate rate unjustly discriminates against interstate commerce.

It is undoubtedly true as was pointed out by the Supreme Court of the United States in *Railroad Commission of Wisconsin* v. *Chicago B. & Q. R. R.* (257 U. S. 563), that if the railroads are to earn a fixed net percentage of income, the lower the intrastate rates, the higher the interstate rates

may have been, and that the Transportation Act of 1920 may be said to have adopted the policy that the effective operation of the act "will reasonably and justly require that intrastate traffic should pay a fair proportion of the cost of maintaining an adequate railway system" (*supra*, p. 588). But this is far from saying that the intrastate rates and the interstate rates must be on a parity. The problem of determining what is a fair proportion of the burden that should be borne by intrastate traffic is one which the Interstate Commerce Commission is required to deal with, and its decisions must be based on findings that low rates for intrastate commerce would constitute an unfair burden on interstate commerce.

In 1936, the commission amended its order by requiring a reduction in rates in interstate commerce (214 I. C. C., 174). The order, Exhibit 1, specifically provided that in interstate commerce, rates be reduced to 2 cents per passenger mile in coaches and to 3 cents per passenger mile in Pullman trains. The report of the commission, Exhibit H, upon which the order was based, does not discuss the problem of the relation between intrastate rates to interstate rates, nor does it determine that intrastate rates should be lowered as the result of this order. Indeed, it was assumed by at least one of the respondents here that the order of the Interstate Commerce Commission did not offect its right to maintain the higher rate and it was only after the petitioner initiated proceedings under Section 57 (a) of the Railroad Law that the order of the courts of this state was obtained directing the respondent Long Island Railroad Company to reduce its rates to the level of the interstate railroad rates (*Transit Commission* v. *Long Island Railroad Co.*, 272 N. Y. 27).

Except for intermittent changes during periods of experiment, the 1936 order of the Interstate Commerce Commission remained substantially unchanged until the order of January 21, 1942.

This last order of the commission resulted from a petition by the railroads, among them the respondents, for authority to increase their rates, fares and charges. The petition, Exhibit V, prays for an increase "of 10% in all fares," and also asks "that the cooperation of the State Commissions be invited, as provided by law, in any investigation instituted and conducted by the Commission." The order, Exhibit N, provided "that the increased passenger fares as proposed by the said petitioners be and they are hereby approved." No express statement that the intrastate rates shall be increased is contained in the order (nor so prayed for in the petition). Nor, upon careful analysis of its entire context, read in the light of its antecedent history, can such an inference be drawn from the provisions of the order modifying the prior orders "only to the extent necessary to permit the increase herein authorized"; nor from the fact that the order requires that it be filed in the dockets of the prior proceedings which considered intrastate rates.

(The order of January 21, 1942, contains this provision: "It is further ordered, that all outstanding orders, as amended, of the Commission, authorizing or prescribing interstate and *intrastate fares*, or bases of fares be, and they are hereby modified, effective concurrently with the establishment of the increased fares herein approved, only to the extent necessary to permit the increase herein authorized, to be added to the interstate and intrastate fares approved or prescribed in, or maintained or held by virtue of said outstanding orders; * * *." This provision, standing altogether by itself, would lend strong support to the claim of the respondents that the Interstate Commerce Commission had intended to increase intrastate rates. Why amend orders dealing with intrastate rates if there was no intention to deal with them? But the provision quoted must be read in the light of the entire order, its preambles as well as its directing provisions. Thus read, it becomes

clear that the purpose of the quoted section of the order is merely to render possible action by the state regulatory bodies, to approve similar increases in intrastate rates. In its first preamble the order refers to the fact "that proper authorities of all states have been notified of this proceeding and *similar* application has been or *will be* made to the regulatory authority of the respective states for *permission* to increase *similarly* petitioners' *intrastate* rate fares and charges." In the light of this recitation, it is obvious that in this aspect no more was intended by the order than to lift any restrictions that might exist barring applications to state regulatory bodies for permission to increase intrastate rates.)

The report upon which the order of January 21, 1942 is based was not before me on the trial, nor until after the final submission and exchange of briefs. It was issued on March 2, 1942. Now that it has been brought to my attention, I have studied it with care and it is to be deemed as part of the record.

Unfortunately there is nothing contained therein which tends to resolve the doubt engendered by the wording of the order itself. The intention or lack of intention to treat with intrastate rates is still obscure, as the report employs the same form of expression found in the order of the commission without further explanatory reference.

I must conclude that under the circumstances of this proceeding it is impossible to hold that there exists any explicit requirement of the Interstate Commerce Commission that the intrastate passenger rates of these respondents must conform to the interstate rates authorized by the order of January 21, 1942, or that the order of January 21, 1942, in any way directs the respondents to increase their passenger rates by 10 per cent in intrastate commerce.

Except only where intrastate rates fixed by state authorities have been found to interfere unduly with inter-

state commerce, the prerogative of the state in regulating railroad rates are not subject to interference by congressional action nor to any powers delegated to the Interstate Commerce Commission. The maintenance of a sound railroad system is of vital concern to the people of the State of New York and that this can be achieved only through the careful supervision of the railroads by a governmental agency conversant with the problems and charged with the high duty of alert and circumspect regulation is a lesson which the last fifty years have taught to the American public at no inconsiderable cost. This is not to doubt either the wisdom or necessity of similar supervision in interstate commerce by federal agencies nor to fail to realize that where a clear conflict exists between state and federal regulation the latter must prevail (*Pennsylvania R. R. Co.* v. *Illinois Brick Co.*, 297 U. S. 447). Only the other day, the Supreme Court of the United States, speaking through the Chief Justice, said: "The power of Congress over interstate commerce is plenary and complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution (*Gibbons* v. *Ogden*, 9 Wheat. 1, 196). It follows that no form of state activity can constitutionally thwart the regulatory power granted by the commerce clause to Congress. Hence the reach of that power extends to those intrastate activities which in a substantial way interfere with or obstruct the exercise of the granted power" (*United States of America* v. *Wrightwood Dairy Co.*, decided February 2, 1942, 10 U. S. Law Week 4191, at 4192).

While these principles are firmly fixed in the framework of our constitutional law, here neither Congress nor the Interstate Commerce Commission has spoken. The maintenance of the dignity and importance of state regulatory bodies requires that their powers and functions be safeguarded by the courts, and that their authority, where it exists, be fully enforced. The remedies which the re-

spondents have are by appeal directly to the Interstate Commerce Commission itself. "The appropriate remedy," said Mr. Justice Brandeis, "under such circumstances is an application to the Commission requesting it to suspend the operation of the order in so far as it may affect isolated cases and if necessary to enter an independent order dealing specifically with them" (*Georgia Public Service Commission* v. *United States of America, supra*, at p. 772).

The respondents have sought to limit the preamble in the order of January 21, 1942, which recites that *similar* application will be made to state regulatory bodies for permission to increase intrastate rates, to rates for the transportation of milk and cream and rates charged for commutation fares. But the history of the rate regulation of these respondents by the Interstate Commerce Commission forbids such an interpretation. Exhibit R, which is the order of the Interstate Commerce Commission, entered on the 12th day of December, 1927, specifically vacated that portion of the order of November 13, 1929, in so far as it regulated rates for the transportation of "milk, cream, skim milk, butter milk, condensed milk, evaporated milk and pot cheese in intrastate commerce within the State of New York." The right of the state regulatory bodies, therefore, to fix intrastate rates with respect to these commodities from the date of that order was complete. At the same time, the order of the Interstate Commerce Commission of January 21, 1942, in *Ex Parte* 148, as we have seen, provided for an increase in rates "as proposed by the said petitioners." The petition, Exhibit V, specifically includes a proposal by the respondents here that "a uniform increase of 10% in all fares, including rates and charges for milk and cream and articles grouped therewith" be permitted. It is apparent, therefore, that the order of the Interstate Commerce Commission, in *Ex Parte* 148, if held to apply to intrastate rates, would necessarily include rates on milk and cream and the quoted preamble relied on by

the petitioners here could hardly be given the limited scope which the respondents urge.

Again, with respect to commutation fares, the order of the Interstate Commerce Commission of the 13th of November, 1920, Exhibit F, expressly excluded commutation fares from the increase in intrastate rates there ordered. It was, therefore, not necessary to modify that order to permit state regulatory bodies to authorize an increase in commutation fares. Presumably, the Interstate Commerce Commission, *in 1920*, was of opinion that the maintenance of a lower rate for commutation fares did not work a discrimination against interstate commerce, and my attention has not been called to any finding by the commission that any other conclusion was urged by them thereafter.

Finally, the argument limiting the scope of the preamble quoted loses sight of the two words "similar" and "similarly," used in the preamble. What the Interstate Commerce Commission envisaged by its order was a *similar* application to increase similarly petitioners' intrastate rates. To say that these words are limited only to rates for milk and cream and commutation fares would seem to distort the meaning of plain words by arbitrarily contracting their usual, plenary, significance.

Much has been said concerning the continued effectiveness of the order of the Interstate Commerce Commission in docket number 11263, made November 13, 1920, Exhibit F. On the part of the respondents, it is argued that that order is still in force, and in effect requires the maintenance, until further order of the Interstate Commerce Commission, of intrastate rates on a level with interstate rates. Although disavowed in oral argument, the briefs submitted by the respondents frequently make the point that the effect of that order is to require intrastate rates to be maintained permanently at a level with interstate rates. On page 9 of the respondents' reply brief they say: "The cumulative effect of the above is to establish that

the thirteenth section order in docket number 11263 did not die in 1936, but remained in full force and effect as modified, for the purpose of establishing a minimum level for intrastate passenger fares within New York so as to prevent the discrimination which the Commission found would result from a level of intrastate fares within this State lower than interstate fares." This can only mean that the respondents contend that intrastate rates cannot be reduced below interstate rates, regardless of what changes are ordered by the Interstate Commerce Commission in interstate rates, and in spite of continued complete silence, both as to findings and order, with respect to interstate rates. But an examination of the order made by the Interstate Commerce Commission in docket number 11263 reveals that it cannot be made to bear this burden. The order explicitly says that the railroads are directed "to cease and desist" from practicing the undue prejudice against interstate commerce there found and they are directed to establish rates in intrastate commerce comparable to rates then in effect under the order in *Ex Parte* 74. Taken literally, it would mean that the respondents are required to maintain their intrastate rates at the level fixed by the commission for interstate rates in *Ex Parte* 74. But the rates fixed in *Ex Parte* 74 have been several times amended by the commission, the last amendment being authorized in *Ex Parte* 148, by the order of January 21, 1942. There is nothing, either in the order, Exhibit F in docket number 11263, or in any subsequent order of the Interstate Commerce Commission which justifies the conclusion urged by the respondents that the interstate rates of these respondents must be forever maintained at the level of the varying interstate rates authorized by the commission from time to time. Had the commission made such an order, it could not be for this court to question its power to do so. But if the view I entertain is sound, that the commission would be without power to make such a

blanket order for all time—that there is necessary a specific finding in each case or at least recurrently—that discrimination against interstate commerce required it, then it is clear that language more explicit and plain would be required to justify the conclusion that the commission intended that result. I repeat, had the commission made such an order, it would not be subject to review in this court; but I may not agree that the Interstate Commerce Commission would obliquely make an order under circumstances such as these, where its power to do so is open to serious question.

The practice adopted by the railroads in 1920 throws further light on this issue. There too the order increasing railroad rates, in general language, was assumed by the railroad to apply to intrastate rates. But it was not until a separate proceeding was brought under section 13, subdivisions 3 and 4 of the act, before the Interstate Commerce Commission, and an express finding of discrimination against interstate commerce was made that an order of the commission was entered directly dealing with intrastate rates.

Upon the utmost that can be said for the position of the respondents, it remains that the scope of the order of the Interstate Commerce Commission of January 21, 1942, is in doubt. But I am enjoined to resolve such doubt in favor of the right of the state regulatory bodies. As the Supreme Court of Illinois said in *Rockwell Lime Co.* v. *The Commerce Commission* (373 Ill. 309, 319, cert. den. 314 U. S. 600): "Where a serious doubt obtains as to whether an order of the federal Commission extends to intrastate rates, the doubt should be resolved in favor of the exercise of the state's power." To the same effect is the opinion of Mr. Justice Brandeis in *American Express Co.* v. *South Dakota ex rel. Caldwell* (244 U. S. 617).

Where an order is ambiguous, reference may be had to

the report of the commission (*Illinois Commerce Commission* v. *United States of America*, 292 U. S. 474; *Georgia Public Service Commission* v. *United States of America*, 283 U. S. 765).

Presumably, either side to this proceeding is at liberty to apply to the Interstate Commerce Commission for a clarification of its orders. A further order of the Interstate Commerce Commission might very well be entered either explicitly asserting that the matter of intrastate rates in the State of New York has been left to our state regulatory bodies or directing that they be increased to a parity with interstate rates. The decree to be entered herein, therefore, will provide that either party may, at the foot thereof, apply for an order amending the decree modifying the injunction to be granted herein, in part, or vacating it in its entirety.

This proceeding, as I have earlier pointed out, has been brought under the authorization contained in section 57 of the Public Service Law. There, the court is enjoined that "the final judgment in any such action or proceeding shall either dismiss the action or proceeding or direct that a writ of mandamus or an injunction, or both, issue as prayed for in the petition or in such *modified or other form as the court may determine will afford appropriate relief.*"

Accordingly, a decree will be entered making the temporary injunction permanent; but providing that either side may apply, at the foot of the order, for a modification thereof or to vacate the same upon the presentation of further clarifying orders of the Interstate Commerce Commission.

Findings of fact and conclusions of law having been sufficiently indicated in this opinoin, they are hereby dispensed with.

Settle decree on three days' notice.

The following is a reprint of all of the recitals in the supplemental report of March 21, 1942, which report is relied upon by appellee as sustaining the order in question as that report referred to passenger fares and passenger-train services:

APPENDIX B.

Passenger Fares and Passenger-Train Services.

As stated, no increase is sought in the fares for members of the armed forces traveling on furlough, or in the extra fares applicable on particular trains. The latter fares are excepted for the reason that the services for which they are charged are not directly affected by the recent wage increases. No authority is sought to make effective any increases in the charges for accessorial or allied passenger-train services, such as handling baggage or excess baggage, switching loaded or empty passenger or baggage cars, moving special trains, parking passenger or baggage-car equipment, transporting passenger automobiles, motion picture films, newspapers and periodicals, invalid chairs, and burial cases, and transferring passengers between stations in the same city.

The history of the passenger fares, traffic, and revenues of the railroads in the last several decades may be found in *Passenger Fares and Surcharges*, 214 I. C. C. 174, and *Eastern Passenger Fares in Coaches*, 237 I. C. C. 271, and will not be restated. The basic fares generally in effect throughout the country when the petition was filed were: In sleeping and parlor cars, one way, 3 cents per mile; round trip, in the East, except locally in New England, a descending scale from 3 cents per mile for the shorter hauls to 90 per cent of 3 cents at 900 miles; in the South, 30-day

tickets 2.25 cents, 6-month tickets 2.5 cents; in the West, 60-day tickets 2.25 cents, 6-month tickets 2.75 cents; in coaches, one way, 2 cents per mile in the East and West, and 1.5 cents in the South; round trip, in the East, except locally in New England, a descending scale from 2 cents for the shorter hauls to 1.5 cents at 533 miles, 1.8 cents in the West, and 1.35 cents in the South.

The average revenue per passenger-mile on the class I railroads for 1940 was 2.3 cents in sleeping and parlor cars and 1.51 cents in coaches. On all passenger traffic in the year ended September 30, 1941, the average was 1.754 cents, the lowest rate per mile in railroad history. The average increase per mile proposed is thus not more than 2.3 mills in sleeping and parlor cars, 1.51 mills in coaches, and 1.754 mills on all passenger traffic. In the year ended September 30, 1941, the total passenger revenue was $483,568,775, which was 33.6 per cent less than in 1930, but the number of passenger-miles was 2.82 per cent greater and the average-mile revenue 35.4 per cent less than in 1930.

Petitioners express confidence that the increase proposed will not curtail the travel volume, which they estimate will not be less in 1942 than it was in 1941. Business and economic conditions are more favorable for rail travel than in 1936 when the present maximum basis of 3 cents in sleeping and parlor cars and 2 cents in coaches was prescribed by us. An important contributing factor is the recent curtailment of automobile production and a scarcity of rubber tires for automobiles.

The only protestants against the proposed fare increase are a representative of the State of South Dakota, and an individual who is a frequent passenger, who appeared in his own behalf. The former based his opposition upon the belief that increased fares would discourage travel by rail and would not result in increased revenue to the carriers. The latter, for many years a student of transportation

economics, presented data to show that since 1920, when the last general increase in passenger fares throughout the country became effective, increased fares usually resulted in reduced revenues, and reduced fares in increased revenues. He is convinced that the increase now sought will have the same effect.

Because of the abnormal conditions which now prevail throughout the country we are of the opinion that the increased fares proposed will yield substantial amounts of additional revenues, and that the passenger service justly and reasonably should contribute to meeting the added operating costs of the railroads.

In an appropriate order made in this proceeding on January 21, 1942, we found that the increase in fares proposed is necessary to enable the petitioners to continue to render adequate and efficient railway transportation service during the present emergency, and that the proposed increased fares will be reasonable and lawful. We therein approved the proposed increased fares subject to a suitable rule for the disposition of fractions stated in the order.[2]

All our outstanding orders, as amended, authorizing or prescribing interstate and intrastate fares, or bases of fares, were modified by that order, effective concurrently with the establishment of the increased fares therein approved, to the extent necessary to permit the authorized increase to be added to the interstate and intrastate fares approved or prescribed in, or maintained or held by virtue of, such outstanding orders. We retained jurisdiction for the purpose of determining, if need be, the lawfulness of any particular fare or fares resulting from that order.

2. The rule of fractions provided that when the total increased fares are less than $1, fractions of less than 0.5 cent shall be dropped and fractions of 0.5 cent or greater may be increased to the next whole cent, and that when the total increased fares are more than $1, such fares shall end in 0 or 5, but that no more than 2.5 cents shall be added to the present fares as increased by 10 per cent in order to make such total fares end in 0 or 5.

Increased fares were filed and became effective February 10, 1942.

The foregoing findings as made in our order of January 21, 1942, are here renewed and affirmed.

As pointed out, the petitions of the carriers do not seek to increase the charges for accessorial or allied passenger-train services, certain of which we have named above. Accordingly, the authority granted in our order of January 21, 1942, above referred to, including permission therein to publish and file the increased fares on 10 days' notice, made no reference to charges for such services. Nevertheless, many of the tariffs filed under the purported authority of that order also included increased charges for the accessorial or allied services in addition to increased passenger fares. We have suspended the effective date and entered an order of investigation as to such increased charges. The matter is now pending.

An increase of 10 percent is proposed in the rates and charges on milk and cream, and articles grouped therewith, as published in passenger tariffs. Usually these commodities are carried on passenger trains. This rate proposal will be considered later here. No specific evidence in support of the proposal as to milk and cream was offered by petitioners.

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 178

ILLINOIS COMMERCE COMMISSION, JOHN D. BIGGS, WILLIAM PARRILLO, ET AL.,

Appellants,

vs.

CHARLES M. THOMSON, AS TRUSTEE OF THE PROPERTY OF CHICAGO AND NORTH WESTERN RAILWAY COMPANY,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

APPELLANTS' REPLY BRIEF.

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APPELLANTS' REPLY BRIEF.

SUPPLEMENTAL STATEMENT OF FACT.

At page 4 of appellee's brief it is said that

> "the federal courts take judicial notice of Interstate Commerce Commission reports, orders and publications",

authorities to that effect being cited.

The defendants deem it appropriate to state in this reply brief a fact pertinent to the history of the order in ques-

tion which was not available at the time that appellants' original brief was filed.

On January 7, 1943, the Interstate Commerce Commission, upon the application of Honorable James Francis Byrnes, Director of Economic Stabilization, and of the Office of Price Administration, entered an order reopening the proceedings in the matter of *Ex Parte* 148.

Brief Introductory Observations.

Although appellee's argument is distributed under eight points, it appears that its substance is addressed to the following cardinal propositions:

First. Appellee argues that the Interstate Commerce Commission was invested with jurisdiction to enter the order in question.

Second. Appellee argues that the order is not void for want of sufficient findings of fact. This contention rests upon two independent subsidiary contentions:

I. Appellee argues that because the order is general and nationwide in scope, it is so far "legislative" in character that it is exempt from the requirement of due process that administrative orders must be supported by specific findings.

II. Appellee argues that in any event, the order contains sufficient findings to support it.

Third. Appellee argues that appellants may not attack the order in question in the present proceedings but should have resorted to an independent suit in equity to enjoin its enforcement.

Fourth. Appellee argues that the proper intent and construction of the order is such as to entitle appellee to collect the fares in question without the sanction or approval of the Illinois Commerce Commission.

Fifth. Appellee argues that, apart from any question of the validity or proper meaning and effect of the order, the complaint made a case of unconstitutional confiscation of appellee's property.

The first four of appellee's propositions as above summarized relate to the validity and effect of the Interstate Commerce Commission's order in question and to the propriety of questioning its validity in these proceedings.

The fifth of those propositions undertakes to vindicate the decree appealed from entirely independently of the Interstate Commerce Commission's order.

Appellee's argument that the Interstate Commerce Commission had plenary jurisdiction to order a ten per cent increase in fares, not only as to interstate but as to intrastate commerce, was quite unnecessary. Appellants do not dispute the authority of the Interstate Commerce Commission, deriving from admittedly constitutional acts of Congress, to raise the fares in question. Appellants do contend that the order is of no avail to appellee, not because the commission had no jurisdiction with respect to the rates in question, but because the order is invalid for want of sufficient findings and because it was not the intent of the order peremptorily to authorize the increase in question.

In response to appellee's contention that, wholly apart from the action of the Interstate Commerce Commission, the complaint must be sustained as making a case of confiscation, appellants will demonstrate that the complaint, notwithstanding its charge in general terms that the rates sought to be enjoined were confiscatory, cannot seriously have been conceived upon grounds independent of the Interstate Commerce Commission's order.

Although the complaint does undertake to charge inadequate earnings, it not only totally fails to apprise the court of any adequate factual basis for such a charge, but totally omits to plead the content or substance of the evidence before the Illinois Commerce Commission. The defendants will argue that even if the complaint had properly charged facts showing that its rates were so unreasonably low as to be inadequate, it must necessarily show proof of those facts before the Illinois Commerce Commission.

I.

The order in question is invalid for want of sufficient findings of fact.

Before we reply to the contentions advanced in the plaintiff's brief, we deem it is most important to distinguish very sharply between two entirely distinct premises implicit in the plaintiff's argument but not clearly differentiated in the structure of his brief. These two completely separate propositions may thus be stated:

First: That the "legislative character" of the order in question **exempts** it from the requirement of due process of law that administrative orders must be supported by specific findings.

Second: That the order, together with recitals in the report of March 2, 1942, **contains findings sufficient to support its provisions.**

In other words, the plaintiff really contends, *first*, that because the order is legislative in its nature and effect, it **need not** contain or refer to findings of fact, and *second*, that in any event, it **does** contain adequate findings.

In reply to these separate contentions, respectively, the defendants expect briefly but conclusively to demonstrate in this brief:

First: That under the applicable decisions of the Supreme Court of the United States, the "legislative character" of the order does **not** dispense with the constitutional requirement of findings in administrative orders, as such findings are distinct from pronouncements of conclusions; and

Second: That notwithstanding the plaintiff's argument to the contrary, the recitals in the instant order, even when supplemented by the matter in the report of March 2, 1942, do **not** in substance or principle comply with this requirement.

(i)

The legislative character of the order in question did not and could not dispense with the constitutional requirement that orders affecting property rights must be supported by findings of fact.

The plaintiff's first argument is, in its essential substance, that because orders of the kind here involved are frequently and, in the sense intended, correctly referred to as "legislative" in character, such orders need not embody specific findings of fact. As we shall point out a little later in this brief, an examination of the very cases relied upon by the plaintiff, as well as the consideration of other pertinent decisions, makes it clear that, directly contrary to the argument in support of which plaintiff's cases are cited, the rule is that "legislative" powers can constitutionally be delegated to administrative agencies **only upon the condition that the agency find and recite the factual basis for the exercise of the delegated powers**; and that the facts must not only be found, but recited, in order to impart validity to "legislative" commands of executive agencies. But before considering the applicable authorities, the defendants wish to make the following important preliminary observations:

The plaintiff is quite correct in contending that since the transportation act of 1920, the Commission may—and obviously must—base its general orders upon a broad view of the general situation of the carriers against a perspective of the national economy. The Commission need not and, indeed, cannot find or make a "reasonable rate" for each carrier in the country as to each commodity transported or each passenger service rendered between each point of origin and destination. The Commission may and perhaps must predicate its general order, comprehensive in scope, upon a "law of averages" and upon common, ordinary, or generally prevailing conditions, reserving juris-

diction to correct by appropriate specific orders particular inequalities as to particular rates. (The *New England Divisions* case, 261 U. S. 184.)

Now, as we shall show by the authorities, this merely means that the Commission may find facts as to general, common or average conditions. But, as the cases indicate, it does **not** mean that conclusions may be substituted for facts, **even if the facts themselves are those of an average, general or common situation.** In other words, the Commission might, indeed, find the general or average proportion of passengers to freight traffic and the general or average proportion of expense of labor, other operating costs, depreciation, capital expenditure and other factors attributable to different kinds or classes of service; frankly recognizing the possibility or even the certainty of individual hardship and reserving jurisdiction to correct such hardship by specific order.

But the basis of a rate schedule, even if generalized by averages, is none the less a **factual** basis. If, for example, such specific items as labor cost, the cost of maintenance, depreciation, and the like have increased by, let us say, ten per cent on the average, that increase is as much a fact as would be the increase in cost of a particular haul by a particular carrier.

The **facts**—even if they are "**average**" facts—should be found; and a mere pronouncement that rates are "reasonable", "fair", or "just", or that they are

> "necessary to enable petitioners to continue to render adequate and efficient railway transportation service"

or that

> "the passenger service justly and reasonably should contribute to meeting the added operating cost of the railroad."

is a conclusion, whether these opinionative terms are applied to a single rate or to all of the rates in the country.

A case cited by the plaintiff in support of its contention

that orders "legislative" in character need not be supported by specific findings, but actually directly hostile to that contention, is *St. Joseph Stockyards Co.* v. *U. S.*, 298 U. S. 38. That case is a leading one upon the "legislative character" of administrative orders fixing rates. It is pointed out in no uncertain terms that where Congress directly and immediately enacts a command, such as the establishment of a rate schedule,

"its determinations are conclusive";

but the case further holds, no less clearly, that Congress may delegate legislative powers **only provided that the exercise of such power is conditioned upon an administrative finding of facts.**

The court said at page 51:

> "When the legislature itself acts within the broad field of legislative discretion, its determinations are conclusive. When the legislature appoints an agent to act within that sphere of legislative authority, it may endow the agent with power to make findings of fact which are conclusive, **provided the requirements of due process which are specially applicable to such an agency are met,** as in according a fair hearing and acting upon evidence and not arbitrarily. *Interstate Commerce Comm'n* v. *Louisville & Nashville R. Co.*, 227 U. S. 88, 91; *Virginia Ry. Co.* v. *United States*, 272 U. S. 658, 663; *Tagg Bros. & Moorhead* v. *United States*, *supra*, p. 444; *Florida* v. *United States*, 292 U. S. 1, 12." (Emphasis supplied.)

Incidentally, it is interesting to contrast the findings in that case with those in the present case. The court said at page 46:

> "The findings are elaborate. They include detailed findings with respect to the services rendered by appellant and its rates, the used and useful character of appellant's property, the valuation of used and useful land, the value of appellant's structures on the basis of cost of reproduction new less depreciation, work-

ing capital, going concern value, fair value on the basis of the facts found, fair rate of return, reasonable operating expenses (including repairs, depreciation and taxes), necessary revenue and volume of business."

No such recitals are to be found in the present order.

At page 15 of the plaintiff's brief, counsel cite the following case in a footnote:

Texas & Pac. Ry. v. *Gulf, Etc., Ry.* 270 U. S. 266, 277.

This case merely held, in the language of plaintiff's brief,

"that preservation of 'earning capacity' of the carriers has * * * become 'a matter of national concern.'"

Of course the rate structure of the nation's transportation utilities is "a matter of national concern." It is because of this "national concern" that the Interstate Commerce Commission was created. "National concern" does not mean concern for the carriers alone. It means concern for industry, for the traveling public, and for the nation as a whole, for whose service the carriers exist and who are required to bear the financial burden of that service.

To maintain such service the carrying rates, both interstate and intrastate, must be adequate; but the adequacy of the rates must be ascertained from a **factual** basis. Such rates must be equitably proportioned among the classes of traffic; and equitable proportion requires a determination of facts.

We agree with the declaration by the courts that the matter is one of "national concern". The gravity of that concern requires that the principles of due process of law be scrupulously observed. Such "national concern" should and must be manifested by the Interstate Commerce Commission; and it should and must be so manifested in the form of full and explicit findings of the facts.

The plaintiff attempts to distinguish the following cases cited by the defendants in their original brief:

State of Florida v. *U. S.*, 282 U. S. 194.

U. S. v. *Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499.

Atchison Ry. Co. v. *U. S.*, 295 U. S. 193.

The basis upon which the plaintiff undertakes to discriminate these cases from the instant case is that in the cases cited the orders in question were not general orders, national in scope. But no authority cited by the plaintiff and no sound reason advanced in his brief suggests that although the Commission may not increase a particular rate without making findings, it may impose upon the traveling public a blanket ten per cent increase in passenger fares effective throughout the country with only such generalities and conclusions as pronounce the new rate "necessary", "fair", "just", or "reasonable". As the cases cited above hold, these adjectives merely sum up the Commission's opinion or conclusion. No facts are stated to support the above conclusions and, as has been pointed out (*Defendant's Original Brief*, Point I, pages 16-23), the courts have repeatedly held that such findings are insufficient to support an order of the character in question here.

Nothing whatever is gained by the plaintiff's statement that the proceeding in which this order was entered was a "revenue case, not a rate case". Neither authority nor reason suggests that the character of the proceeding as a "revenue case" excuses the Commission from making findings of fact.

We have carefully examined each of the authorities cited by the plaintiff in his brief. Not one of them declares, either directly or by intimation, either by way of holding or by way of *dictum*, that the Interstate Commerce Commission may exercise "legislative" faculties in ordering a general increase in rates without making adequate findings.

On the contrary, in the case of *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, cited by the defendants in their original brief, the order in question was promulgated by the President and was intended to effectuate a policy national in scope, having for its object the vitally important conservation of oil and petroleum products. So far as the generality of the purpose of this order was concerned, the order there was similar to the order here. Yet the Supreme Court denounced the order as unconstitutional for want of sufficient findings.

The defendants therefore submit that the plaintiff's arguments are not sufficient to sustain the premise that an order, even though "legislative" in character and general in nature, is valid when not supported by sufficient findings of fact.

(ii)

The recitals in the present order and in the supplementary report are insufficient to sustain the order.

Under the previous point it was urged, and, we believe, clearly shown that there is nothing in the nature or character of the present order to exempt it from the constitutional requirement that it be supported by sufficient findings. Under the present point we shall briefly urge that in spite of the arguments of the plaintiff to the contrary, the findings embodied in the order, even when supplemented by the matter incorporated in the report of March 2, 1942, are totally inadequate.

In the defendants' original brief it was pointed out that mere pronoucements that rates are "reasonable" or "unreasonable", "fair" or "unfair", "just" or "unjust", or "necessary" or "unnecessary", are insufficient. (*State of Florida* v. *U. S.*, 282 U. S. 194, *Defendants' Original Brief*, pages 14-15; *U. S.* v. *Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499, *Defendants' Original Brief*, pages 16-23.)

No case cited by the plaintiff holds to the contrary, either in general terms or in terms specifically applicable to orders of the kind involved here.

At pages 7 to 12 of his brief, the plaintiff seeks to integrate the present order with the Commission's 1925 order (Exhibit A attached to the complaint) and its 1936 order (Exhibit 3 introduced at the preliminary hearing), and to derive from the findings embodied in those orders support for the present order. A moment's reflection will clearly demonstrate the fallacy of this argument.

We assume (without conceding) that the 1925 and 1936 orders were based upon sufficient recitals of fact. But manifestly those facts justified those orders—not the present order. Recitals findings that one state of facts existed in 1925 and that another state of facts existed in 1936 do not amount to findings that a **different** state of facts exists in 1942.

The defendants do not contend that the present order may not properly refer to previous orders as bearing upon the situation of the carriers at the time that those orders were entered. But clearly, those findings justify the rates fixed years ago—**not** a change in those rates. We shall not further protract our argument that findings made over sixteen years ago and over five years ago, respectively, justifying a rate schedule at that time, do not and cannot justify a change in that schedule in 1942.

Therefore the defendants contend, as they have argued in their original brief, that the order of January 21, 1942 is invalid for want of sufficient findings of fact.

II.

The present order is subject to collateral attack by the defendants in the present proceeding and upon the present motion.

At various points in his brief, the plaintiff conducts an adroit and skillful argument that the defendants may not in the present proceedings challenge the validity of the order upon which the plaintiff relies. (See *Plaintiff's Brief*, pages 21-29.)

The plaintiff points out that the cases cited by the defendants were injunction proceedings in which it was sought to restrain the enforcement of orders of the Commerce Commission or other agencies. The plaintiff therefore argues that those proceedings constituted "direct attacks". It is our understanding that a "direct attack" is an attack upon an order or judgment in the proceeding in which it is entered or in some continuation thereof, as, for instance, upon a statutory review in the nature of an appeal from a writ of *certiorari* to the Commission or court making the order; and that a collateral attack is an attack in an independent proceeding wherein the order is assailed as absolutely void.

Each of the cases cited by the defendants was an independent equity proceeding and to that extent, at least, similar to the present proceeding. In each of the cases cited by the defendants as holding an order of the Commission or other agency invalid, the court held that the order was unconstitutional, null and void.

In other words, the plaintiff argues that, even if equity would **enjoin** the enforcement of the execution of the present order in a suit brought for that purpose, it will nevertheless enforce and give effect to that order by affirmative injunction at the suit of the plaintiff and that the de-

fendants are precluded from even resisting negatively and by way of defense the effect of the present order because they have not affirmatively asked to have its enforcement enjoined.

The sophistry of this argument is best exposed by a clear statement of the argument itself.

If the defendants' contention that the order is void for want of sufficient findings is correct (*Defendants' Original Brief*, Point I; *This Brief*, Points I and II, *ante*), it would seem to follow necessarily that the plaintiff cannot have the order affirmatively enforced in this proceeding.

The true distinction between those cases in which a state or a utility sues to enjoin an order of the Commission and cases such as the present case is stated by this court in *New York* v. *United States*, 257 U. S. 591, in the very excerpt quoted by counsel for the plaintiff at page 21 of plaintiff's brief.

That distinction, as perceived in the language quoted, is that in a suit asserting the order of the Commission, the court may examine the evidence; but in other proceedings, as the court said, the state authorities are

> "obliged to show that the order was void on the face of the findings **without regard to the evidence.**" (Bold of appellee.)

In this case, the defendants maintain that the order

> "is void on the face of the findings without regard to the evidence."

Thus the case of *New York* v. *U. S.*, cited by the plaintiff, expressly recognizes that the state authorities may **defend** against an order **"void on the face of the findings."**

III.

Notwithstanding appellee's argument to the contrary, the purport of the order was such as merely to approve the increased rate schedule and not such as to relieve the carriers from the necessity of procuring appropriate authority from the states with respect to increased intrastate rates.

The Corporation Counsel of the City of New York, having prevailed in the case of *Transit Commission* v. *Long Island R. Co.*, 33 N. Y. S. (2) 963, the decision in which case has been discussed in the previous briefs in this case, has filed his brief as *amicus curiae* in this court. The considerations and arguments developed in that brief are cogent in reasoning, exhaustive in the compilation and presentation of historical material, and, in our view, excellent in expression. The defendants refer to and adopt those arguments and considerations in reply to the plaintiff's contention that the intent of the order was such as peremptorily to require and authorize the increase in question. It would be a work of supererogation to repeat the substance of the *amicus curiae* brief of the Corporation Counsel.

However, for the immediate convenience of the court, the defendants here state with the conciseness of a summary those considerations which, in their view, should prevail against the plaintiff's construction of the order.

(i)

The order expressly contemplates that application "has been or will be made" to state authorities "for permission to increase similarly petitioners' intrastate rates, fares and charges."

The order recites that

> "similar application has been or will be made to the regulatory authority of the respective States for permission to increase similarly petitioners' intrastate rates, fares and charges; * * *" (R. 32.)

This language is totally and utterly inconsistent with any view that the order, *ex proprio vigore*, authorizes the increase of the rates in question. On the contrary, it inexorably requires the conclusion that with respect to intrasate fares, the carrier must **either** secure the approval of appropriate state authorities **or** have any discrimination corrected by an order under Section 13 with respect to the particular state and the particular carrier or carriers affected by a particular discrimination.

(ii)

The antecedents of the present order refute the plaintiff's construction and support the defendants interpretation of its provisions.

The brief of the *amicus curiae* demonstrates that the orders of the Commerce Commission preterient to and culminating in the instant order are of such tenor as to demonstrate the entirely permissive effect of the order in question.

As indicated in the brief of *amicus curiae*, the previous orders expressly "**required**" changes in rates. The present order equally explicitly "**permits**" such changes.

That brief is likewise convincing upon the argument that the order cannot take effect under Section 13 of the act because it does not purport to correct discrepancies between previously existing intrastate fares and previously established interstate rate structure. It is shown in that brief that the order cannot take effect under the general provisions of the act, particularly under the provisions of Section 15a, because orders under the latter section, although they may be mandatory or permissive as to interstate commerce, cannot operate mandatorily upon intrastate commerce.

(iii)

The extreme generality of the recitals of the present order, even if it did not render the order void, evinces the absence of an intent mandatorily to impose an increase upon all intrastate rates throughout the nation.

The defendants have previously argued that the order in question is void because the findings are insufficient to sustain it against objection on constitutional grounds. (*Appellants' original brief*, Point I; *Appellants' reply brief*, Point I, *ante*.)

However, under the present point, not with respect to the **validity**, but with respect entirely to the **intent and meaning** of the order, the defendants urge that even if the findings in question might be deemed sufficient to sustain the order as valid, they are not of the character that one would expect to find as prefatory to and as constituting the sole basis for an imperative increase in the rail fares of the country during a time of war. Thus, as the New York court pointed out in the *Long Island Railroad case*, the findings might conceivably be consistent with an intent merely to **permit** an increase in rates; but it is inconceivable that the Commerce Commission could have intended to impose a nationwide increase of rates upon recitals so general in terms as those embodied in the present order.

IV.

The plaintiff's complaint cannot be sustained as making a case of confiscation independently of the order of the Interstate Commerce Commission.

The plaintiff seeks to vindicate the equity of his complaint upon the ground that, entirely independently of the order numbered *Ex Parte* 148, the complaint has charged and the defendants, by a motion in the nature of a demurrer, have confessed the confiscatory character of the rates

prevailing previously to the issuance of the temporary injunction in this case.

The defendants' reply to so much of the plaintiff's argument as seeks to sustain the complaint as sounding in the equity of an ordinary confiscation case, quite apart from so much of it as asserts the authority to charge the rates in question because of the Interstate Commerce Commission, can be briefly made.

In the **first** place: "Even if it be granted, for the sake of argument, that the complaint properly charges that rates are so low as to be confiscatory, **the complaint is absolutely destitute of any allegation that any such showing was made to the Illinois Commerce Commission.**"

The function of a federal court of equity in a confiscation case is too well settled to require elaborate consideration. The logic upon which a chancellor supersedes an order fixing a confiscatory rate is that, **the commission having acted arbitrarily and unreasonably and its order being without substantial support in the evidence before the commission,** the plaintiff utility will be deprived of its property without due process of law unless enforcement of the commission's order be enjoined.

Courts of equity will not make any rates for utilities, nor will they protect a rate already instituted or sought to be instituted by the utility, unless the utility can not obtain a recognition of its constitutional rights before the commission.

It is very clear that a court can not say that a commission acted arbitrarily or unreasonably unless at least the substance of the evidence before the commission is pleaded in the complaint and thus made accessible to the court.

This court's recognition of the principles above set forth is clearly expressed in two cases, both cited by the plaintiff in an attempt to sustain the validity of the order of the Interstate Commerce Commission but actually pertinent

in the present aspect of the case. These two cases are this court's companion decisions, the case of *Wisconsin Railroad Commission* v. *C. B. & Q. R. R. Co.*, 257 U. S. 563, and *New York* v. *United States*, id. 591. In the first of these cases, the defendants, the state authorities of Wisconsin, assailed the order upon the ground that it was invalid

> "upon the face of the findings and without regard to the evidence." (p. 600.)

In the second case, the State of New York filed a complaint to enjoin the enforcement of the order. In the first of these cases the evidence before the commission was not before the court. In the second case, that evidence **was before** the court. The importance of the distinction was noted by the court in the *New York* case (at page 600) in the very language cited by the plaintiff at page 21 of his brief. The court said:

> "The defense of the state authorities was a collateral attack upon the order, to prevail in which, **they were obliged to show that the order was void on the face of the findings without regard to the evidence of the absence of it.**"

Similarly, if the order of the Illinois Commission is to be condemned as confiscatory in the instant case, it must be condemned **on the face of the order and without regard to the evidence**, since the substance of the commission's evidence was not before the district court and is not before this court.

But the plaintiff nowhere assails the order of the Illinois Commission as void on its face. The plaintiff does indeed allege that it sustains an operating loss; **but it totally fails to allege that it charged and established the fact of that loss before the commission.** A utility must exhaust its administrative relief before resorting to the equity jurisdiction of the federal courts. *Natural Gas Pipe Line Co.* v. *Slattery*, 302 U. S. 300; *U. S.* v. *Illinois C. R. R. Co.*, 291 U. S. 457; *Prentice* v. *Atlantic Post Line*, 211 U. S. 210.

In the **second** place: The charge that the intrastate

passenger service sustains an operating loss was not made in terms sufficient to support the present injunction. The only language in the plaintiff's entire complaint which even purports to charge confiscation is the language of Paragraph XIV (R. 14), approximately a printed page and a quarter in length.

It is clear that the charges made in this paragraph do not demonstrate the fact of confiscation. Although, in the case of a one-man business or other small concern, the question of annual profit or loss might be purely one of fact, so that an averment, categorical in terms, that such a business had suffered a loss of a thousand dollars might be issuable pleading, the question sought to be litigated upon the plaintiff's complaint was whether the **suburban passenger branch** of an interstate railroad had operated at a profit or a loss.

Clearly, any pronouncement upon that question would involve determinations both of law and of fact. Such an interstate carrier necessarily uses such facilities as tracks, passenger stations, switching apparatus, road beds, and some equipment in interstate suburban passenger service, in interstate and intrastate passenger service and in freight service. Similarly, many charges for the services of employees—such as officers, directors, counsel, watchmen at crossings, the personnel of passenger stations, and the like must be apportioned among several classes of service. The basis of such apportionment is matter of law. A mere averment that a particular branch of a service "operates as a loss" states a mere conclusion; for there is no showing of the **factual** basis upon which one must predicate the **legal** conclusion that charges are properly allocated to that branch. The valuation of the total property is matter of law and fact. No basis of valuation is shown; and the court could not say which of various formulas of valuation is embodied in the plaintiff's averment of value.

The plaintiff, by asserting that it sustained an operat-

ing loss, without the slightest intimation as to how it computed such loss, sought to confront the defendants with a conclusion of the utmost generality. Of course, a motion in the nature of a demurrer admits only facts well pleaded. The complaint in the instant case discharged the dual office of a pleading, that is, of an instrument tendering issues of fact, and of a sworn application for interlocutory relief by temporary injunction. If the defendants were compelled, in challenging the sufficiency of the complaint, to admit so general a conclusion as that of operating loss, with no supporting averments of fact, at the peril of having litigation protracted for months or years while the basis for that conclusion was developed in the event that the defendants should elect to answer rather than to demur, then equity pleading would become an instrument of oppression.

It is therefore respectfully submitted that the charge of operating loss was a mere conclusion, hence was not well pleaded, therefore was not admitted and consequently is not sufficient to sustain the equity of the complaint upon an issue of confiscation.

Conclusion.

For the reasons submitted in the plaintiff's original brief and in the plaintiff's reply brief, as well as for the reasons set forth in the *amicus curiae* brief, the defendants respectfully submit that the decree of the district court was erroneous and should be reversed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 178

ILLINOIS COMMERCE COMMISSION, JOHN D. BIGGS, WILLIAM PARRILLO, ET AL.,

Appellants,

vs.

CHARLES M. THOMSON, AS TRUSTEE OF THE PROPERTY OF CHICAGO AND NORTH WESTERN RAILWAY COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

WILLIAM T. FARICY,
NYE F. MOREHOUSE,
P. F. GAULT,
Counsel for Appellees.

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IN THE DISTRICT COURT OF THE UNITED STATES,
NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

Civil Action No. 4020

CHARLES M. THOMSON, AS TRUSTEE OF THE PROPERTY OF CHICAGO AND NORTH WESTERN RAILWAY COMPANY, A CORPORATION,

Plaintiff-Appellee;

vs.

ILLINOIS COMMERCE COMMISSION, ET AL.,

Defendants-Appellants.

APPELLEE'S STATEMENT AS TO JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

The appellee, believing that the matters set forth below will demonstrate the lack of substance in the questions raised by this appeal, files this, his statement in opposition to appellants' statement as to jurisdiction. Appellee includes herein his motion to dismiss the appeal or in the alternative to affirm the judgment of the District Court on the ground that the questions raised on behalf of appellants are so unsubstantial as not to need further argument.

While the cause is one which otherwise would be reviewable by the Supreme Court on direct appeal from the District Court, appellee asserts that the unsubstantial

character of the grounds stated by appellants is so apparent on the face of the record as to warrant the court in summarily disposing of the appeal at this stage of the proceeding. Appellee also shows that the judgment of the District Court must in any event be affirmed upon the findings of the court as to the confiscatory character of the rates sought to be enforced by the appellants. The allegations of the complaint in that behalf stand admitted and the findings and conclusions of the court unchallenged, thus giving an independent and additional ground of support for the decision below.

The matters here relied upon by appellee are more particularly stated below:

I.

The Controlling Facts Found by the Court Were Pleaded in the Complaint and Stand Admitted by Appellants' Motion Below.

The appellants filed no answer below and elected to stand upon their motion to strike the complaint and dismiss the cause, thereby admitting all facts set out in the complaint and Exhibits A, B, and C thereto attached.

On the final hearing the court had before it the sworn complaint, and the supporting evidence previously received at the preliminary hearing, which included the full texts of the reports and orders of the Interstate Commerce Commission pleaded in the complaint. The court also had before it (1) an order of the Interstate Commerce Commission in its Docket No. 11860, a proceeding entitled "Montana Rates and Fares" entered March 24, 1942, attached hereto as Appendix A, and (2) the opinion of the New York *nisi prius* judge in *Transit Commission* v. *Long Island R. Co.*, attached to appellants' statement on this appeal as Appendix D.

II.

Appellee's Authority to Charge the Increased Passenger Fares Derives from a Connected Series of Interstate Commerce Commission Orders by Which That Commission Exercised Its Paramount and Exclusive Jurisdiction Over the Intrastate Rates Here Involved.

In the third paragraph of appellants' statement under a heading entitled "The Facts," the erroneous statement is made that appellee's right to charge the increased fares here involved is based alone upon the 1942 order of the Interstate Commerce Commission in Ex Parte No. 148 (Complaint, Exhibit B). The inaccuracy of this statement becomes at once apparent upon reading Sections VII, VIII and IX of the complaint, Exhibits A and B attached thereto, and the court's findings 3 to 8, inclusive. It is there shown and found that the Interstate Commerce Commission first exerted its power and authority over these Illinois intrastate suburban passenger fares of the appellee in a proceeding entitled "In the Matter of Intrastate Fares Within the State of Illinois, Docket No. 11703" (102 I. C. C. 479), in which the 1925 report and order (Exhibit B attached to the complaint herein) was entered. That 1925 order was a supplemental order dealing only with these passenger fares of Chicago and North Western Railway Company, whose property and affairs are now possessed and operated by appellee as trustee. As noted in Exhibit B, the original order in that proceeding is reported at 59 I. C. C. 350. As there shown, the proceeding was conducted and these orders entered pursuant to paragraphs (3) and (4) of Section 13 of the Interstate Commerce Act (49 U. S. Code, Sec. 13(3)-(4)), a copy of which is attached hereto as Appendix B. The original report discusses and points out the paramount power of Congress under these paragraphs with respect to

intrastate rates where discrimination against interstate commerce exists. (59 I. C. C., at pages 359-362.)

It further appears from the complaint and findings herein that the supplemental report and order, Exhibit A, like the original report and order, followed a nationwide investigation of freight and passenger rates and charges throughout the United States after the close of the First World War, as a result of which a 20% increase was permitted.[1] That proceeding was the first general rate case before the Commission following the World War. It was a so-called "revenue" case, in that it was an application by the railroads as a whole for a general rate increase necessary to meet increased costs.

The 1925 order, Exhibit A, authorized a 20% increase in these intrastate suburban fares of the appellee in order to bring the level of such rates up to that of the interstate rates which had previously been increased 20% as above noted. This authority was exerted under Section 13 for the express purpose of thus eliminating the undue prejudice, preference and advantage in favor of intrastate commerce and the unjust discrimination against interstate commerce which the Commission found to exist by virtue of the 20% differential between the two classes of fares where the two classes of commerce were being served under substantially the same circumstances and conditions. That is to say, interstate and intrastate passengers traveled in the same cars, sometimes riding in the same seats, and received in all respects substantially the same service, for which the former paid 20% more than the latter.

Following the 1925 order, the Chicago and North Western Railway Company secured an interlocutory injunction restraining the Illinois Commission and other officials from

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[1] That proceeding was entitled "Ex Parte No. 74, *Increased Rates, 1920*." (58 I. C. C. 220 and reference thereto at 59 I. C. C. 354.)

interfering with its establishment and collection of the fares as then increased. The case was never carried further and the injunction still stands.

The 1925 order was of a continuing nature and contained an express provision that it should remain in force until further order of the Interstate Commerce Commission. This is specifically pleaded in the complaint and set forth in the Court's findings here.

In 1936 a further general and nationwide investigation of railroad passenger fares took place. This proceeding was known as Docket No. 26550, Passenger Fares and Surcharges. (214 I. C. C. 174.) While the order in that proceeding resulted in no change in appellee's Illinois intrastate fares, the order contained, nevertheless, a specific reference to the 1925 order and Docket No. 11703. (Exhibit A) and the Commission thereby retained its continuing jurisdiction over appellee's Illinois intrastate commutation passenger fares.

Finally, in the most recent general rate case, which was also a revenue case, the Interstate Commerce Commission again exercised its continuing power and jurisdiction over appellee's intrastate commutation passenger fares in Illinois. In that proceeding, known as Ex Parte No. 148, the Commission entered its order authorizing a general 10% increase in passenger fares on January 21, 1942. The order is attached to the complaint herein as Exhibit B. By reference to the 1936 proceeding, Docket No. 26550, the Commission made this 10% increase in passenger fares specifically applicable to the fares which appellee had established pursuant to the 1925 order in Docket No. 11703, by expressly modifying that and other outstanding section 13 orders.

It was in pursuance of the permission and authority thus granted to the appellee that he filed tariffs on February 6, 1942, with each the Illinois and the Interstate Commissions,

setting forth charges with respect to this Illinois intrastate commutation passenger traffic 10% greater than those then in existence, which were the ones authorized by the 1925 order. The effective date of these tariffs was March 8, 1942. The 10% increase therein stated is the matter here in controversy.

Had the 1942 order (Exhibit B) not modified the 1925 order and thus permitted the increase in fares here involved, the discrimination against interstate commerce found and ruled out in the 1925 order would have been at once revived. The findings in the 1925 order still stand and the Commission's authority over these fares still continues in effect. Simple arithmetic proves the necessity of raising the intrastate fares coincidental with the present raise of interstate fares if the relationship of equality found necessary and provided in 1925 is to be preserved. It seems hardly necessary to add that the presumption of correctness of the 1925 findings must necessarily continue until a showing of changed conditions may justify their modification, in a direct proceeding before the Commission. For that matter the Court may well take judicial notice that the general character of the territory and operations involved has not changed materially. No mountain ranges have sprung up at the Illinois-Wisconsin state line since 1925 to produce different operating conditions interstate in this commutation traffic than exist intrastate. Neither are there any other material differences. And we may well assume that any change in conditions deemed by these appellants sufficient to justify a change in those 1925 findings, would now be made the subject of a complaint before the Interstate Commerce Commission whose latch-string pointedly has been left hanging out.[2]

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[2] The order expressly retains jurisdiction "for the purpose of determining, if need be, the lawfulness of any fare or fares, resulting from this order." See complaint, Exhibit B, next to last paragraph.

Appellants by their motion below have admitted these essential facts establishing the source and continuity of the Interstate Commerce Commission's control over these rates; admitted the existence of the findings in the 1925 order and the correctness thereof as pleaded in the complaint herein, and have admitted the existence of the 1936 order and the 1942 order retaining control and modifying the 1925 order so as to permit the increase here in question. Nevertheless, in their attack upon this rate increase they persist in treating the 1942 order as though it were a thing apart, having no connection or continuity with that which had gone before. In so doing they completely disregard and ignore the facts above mentioned, all of which were found by the Court showing that the 1942 order is *not a wholly new order.* It is simply an *amending and supplementing order.* It and the previous orders dealing with the intrastate commutation passenger fares of the Chicago and North Western Railway Company in Illinois, *taken together,* completely establish appellee's right to these increases. This failure of appellants to recognize these undisputed facts constitutes, in our view, a fundamental weakness rendering their attack on the 1942 order completely ineffective.

III.

The Increased Passenger Fares Here Involved Were Authorized as a Result of Emergency Conditions in a General Rate proceeding. It Was a So-called "Emergency" or "Revenue" Case. It Granted "Blanket" Authority to Increase All Rates Described Therein in General Terms.

In Ex Parte No. 148, the order of January 21, 1942 (Exhibit B) dealt only with passenger fares. As stated in the complaint (p. 10) the Commission on March 2, 1942, issued its report dealing with both increased passenger fares and increased freight rates, and at that time made a

second order dealing with freight rates only. That report and order were submitted to and considered by the Court here at the hearing on the motion for an interlocutory injunction and again on final hearing. Appellants have attached to their statement on jurisdiction here as Appendix C one section only of this report entitled "Passenger Fares and Passenger-Train Services."

The report consists of more than 45 sheets and sets forth numerous other findings and facts. Without reproducing the entire report, we attach hereto as Appendix C certain additional sheets, bearing the same numbers as were shown in the mimeographed report released by the Commission on March 2nd. Facts there found (in addition to those stated in appellants' Appendix C and the order itself) give further support to the order with respect to passenger fares and disclose the general scope, purpose and effect of the proceeding. They may be summarized as follows:

1. The proceeding was instituted shortly after the carriers had been subjected to wage increases of approximately $311,000,000 per year resulting from a strike threat, followed by Emergency Board action under the Railway Labor Act. Necessary increased wage costs of $20,000,000 per year for non-unionized employes, and $30,000,000 per year to protect their properties against sabotage during the war period, were also shown. (Sheets 2 and 3.)

2. The increases were requested for the specific purpose of yielding additional revenue to enable the carriers to meet the increased expenses and insure their ability to continue rendering adequate and efficient service as contemplated by Section 15a of the Interstate Commerce Act. (Sheet 3.)

3. These increased operating costs were general in character and applicable to all traffic handled by the carriers, and the only practical method to meet them was a general percentage increase in all rates and fares, with certain ex-

ceptions not here material. The petition of the railroads called for a general investigation. (Sheet 4.)

4. The request was for a general increase in all rates and fares under the jurisdiction of the Commission, with specific reference to those covering intrastate traffic and specific reference to Section 13(3), and, accordingly, notice of the proceeding given to the states as required by that section. (Sheet 2.)

5. The case was characterized and submitted by counsel for the Class I carriers as "a revenue case, not a rate case." (Sheet 6.) The Commission treated the case as such, and the case involved no investigation or inquiry into specific rates or groups of rates. (Sheets 19, 43.)

6. The inquiry relative to proposed increases in passenger fares was nation wide and specifically covered intrastate fares over which the Commission had jurisdiction by reason of previously outstanding orders. The purpose and intent of the carriers' petition and of the Commission's findings and order was to include an increase in such intrastate fares. (Sheets 12-14.) As pointed out in the complaint below, the Commission's order of January 21st specifically provided for such increase.

7. The "Conclusions and Findings" set forth in the Commission's report clearly state the general character of this proceeding. Commenting upon the general character of the evidence, the Commission said (Sheet 43):

> "Our decision in this proceeding cannot be based on the granting of individual, sectional, or particular industrial desires or needs. There will be some element of hardship and sacrifice whatever we do, or if we do nothing."

The Conclusions also contain a short reference to previous general rate cases involving blanket adjustments of

freight and passenger fares, showing this to be the same type of case. (Sheets 43-44.) It is pointed out that "the exigencies of the case do not permit" of considering the needs of each railway individually with corresponding adjustment of their respective schedules. (Sheet 45.)

8. The authorized 10% passenger fare increase will yield increased revenue for the railroads as a whole in excess of $45,000,000 per year. (Sheet 44.)

9. The Commission's finding and conclusion in granting in part the requested freight rate increases is tied up with the passenger fare increases as follows (Sheet 48):

> "We therefore conclude and find that the proposals before us have not been justified as a whole, but that the resulting rates, fares, and charges will be just and reasonable *if passenger fares are increased to the extent already permitted by our order*, and if freight rates and charges are increased to the extent indicated below and as more particularly specified in Appendix 2." (Italics ours.)

A second fundamental and, we believe, fatal weakness in appellants' attack upon the 1942 order permitting the 10% increase in passenger fares arises because of their failure to recognize Ex Parte No. 148 as a general or "blanket" rate proceeding. This will be pointed out further below.

IV.

This "Blanket" Method of Rate Making in So-called "Emergency" or "Revenue" Cases Has Long Had Specific Approval by This Court.

In the *New England Divisions* case, 261 U. S. 184, the court pointed out the greatly broadened scope of power and responsibility vested in the Interstate Commerce Commission by Transportation Act, 1920, particularly the require-

ment that the Commission fix and determine rates which would enable the railroads of the nation as a whole to maintain and operate an adequate national system of railroad transportation. (Pp. 189-91) The case involved a subsidiary power of the Commission—that of fixing reasonable divisions of through rates between carriers. The number of carriers involved was said to be in excess of six hundred. The order was attacked because the Commission had not proceeded to require specific evidence and render a specific adjudication with respect to each carrier. In rejecting that contention, the court pointed out that such a requirement in a general case of that nature "would be tantamount to denying the possibility of granting relief." (P. 197.)

The opinion by Mr. Justice Brandeis then proceeds to state the historical development of rate making under the Interstate Commerce Act and to find specifically that there is no constitutional obstacle to the adoption or pursuit of this method of rate making, and to show that it has been previously approved by the Court in *Railroad Commission of Wisconsin* v. *Chicago, Burlington & Quincy R. R. Co.*, 257 U. S. 563, 579, where it was pointed out that serious injustice which might otherwise result from the making of rates in this manner by "blanket" orders "could be avoided, by availing of the saving clause which allows anyone to except itself from the order, in whole or in part, on proper showing" (pp. 197-9).[3]

Again in *United States* v. *Louisiana*, 290 U. S. 70, similar contentions were made in an attack upon an increased rate order of the Commission issued under Section 13 raising certain intrastate rates in Louisiana. Following the doctrine of the *New England Divisions* case and applying it to this Section 13 case, the court said that Section 13 (4) properly construed (p. 75):

[3] The orders in Ex Parte No. 148 contain such a clause.

"confers on the Commission the power to raise intrastate rates so that the intrastate traffic may produce its fair share of the earnings required to meet maintenance and operating costs and to yield a fair return on the value of property devoted to the transportation service, both interstate and intrastate. * * *

"* * * § 15a, by its terms, commands the Commission, in providing the required revenue by increasing rates, to deal with the carriers of the nation as a whole or in broad classes, and as this Court recognized in the *New England Divisions Case, supra*, 197, 198, this requirement would be nullified and the administrative arm of the Commission paralyzed, if instead of adjudicating upon the rates in a large territory on evidence deemed typical of the whole rate structure, it were obliged to consider the reasonableness of each individual rate before carrying into effect the necessary increased schedule."

The opinion by Mr. Justice Stone goes on to point out that rates thus increased are subject to later adjustment as to any individual rate or group of rates upon a proper subsequent showing to the Commission (pp. 76-8). There was a saving clause in the Commission's order similar to that mentioned above in the 1942 order here under consideration. The further complaint in that case that the Commission had made no express finding that the increased intrastate rates would be reasonable was rejected by the Court. It was held that no such specific finding was necessary since the order on its face showed its intent and effect to prescribe a level of intrastate rates dovetailing with interstate rates prescribed by the Commission (p. 78).

Reaffirmance of this doctrine of the *New England Divisions* case is presently at hand in the following quotation from the opinion by Mr. Chief Justice Stone, delivered in March, 1942, in *Federal Power Commission* v. *Natural Gas Pipe Line Company of America*, — U. S. —, 62 S. C. R. 736:

"The establishment of a rate for a regulated industry often involves two steps of different character, one of which may appropriately precede the other. The first is the adjustment of the general revenue level to the demands of a fair return. The second is the adjustment of a rate schedule conforming to that level so as to eliminate discriminations and unfairness from its details. Such an orderly procedure for establishing the rates prescribed by the Act would seem to be an appropriate means of carrying out its provisions. Section 5 of the Act was modeled on the provisions of the Transportation Act, 49 U. S. C. §§ 13, 15, which have been interpreted as giving to the Interstate Commerce Commission authority to establish a general level of rates and divisions in advance of a schedule to be filed by the carriers. See *New England Divisions Case*, *supra*, 201-02, 203, n. 21. Cf. Sharfman, The Interstate Commerce Commission, vol. 2, pp. 381-82; *Driscoll* v. *Edison Co.*, 307 U. S. 104."

V.

The Interstate Commerce Commission's Power Under Section 13 Is Paramount and Exclusive. It Has Been Exercised Here So as To Leave the Defendants Without Right, Power or Authority to Interfere With Collection of the Fares Authorized by the 1942 Order in Ex Parte No. 148.

This proposition is quite apparent from the doctrine of the *New England Divisions* and *Louisiana* cases above. It has been so frequently stated in the decisions of this Court as to have become axiomatic. The paramount character of the authority exercised by the Federal Government is implicit in the power itself under our system of dual sovereignties. In this particular instance it is also written into the Federal Statute specifically by the requirement at the end of paragraph (4) of Section 13 to the effect that the rates fixed by the Interstate Commission "shall be

observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding."

This is but one of numerous Federal Statutes which have been sustained under the Commerce Clause by holdings of this Court that the power of Congress extends to the protection of interstate commerce from interference or injury due to activities which are wholly intrastate. *Labor Board* v. *Fainblatt*, 306 U. S. 601.

In *Florida* v. *United States*, 292 U. S. 1, 6, it was specifically held that the Interstate Commerce Commission has the power under Section 13 (4) to prescribe intrastate rates solely for the purpose of removing discrimination against interstate commerce "caused by a disparity of intrastate rates viewed from a revenue standpoint." It is definite on the face of the orders relied upon here (Exhibits A and B attached to the complaint) that the purpose and effect of these orders is to do just that in this case. In the 1942 order the Commission found that the 10% increase in all passenger fares was necessary in order to enable the railroads to meet increased expenses arising during the present emergency period; that the increase is necessary to enable them to continue to render adequate and efficient railway transportation service during the emergency; and that the increased fares will be reasonable and lawful.

In view of the Commission's previous findings in the 1925 order with respect to the necessity of bringing the Chicago and North Western Railway intrastate commutation fares up to and maintaining them at the level of the interstate commutation fares, it could not well have done otherwise in the 1942 order than was done by specifically modifying the 1925 order so as to provide for a 10% increase in these intrastate fares contemporaneously with the 10% increase in the interstate fares. To have done

otherwise would have resulted in a revival of the discrimination against interstate commerce previously condemned in the 1925 order.

VI.

Appellants' Attack Upon the Order in Ex Parte No. 148 Is Purely Collateral in Character. Hence the Order Must Be Given Full Effect Unless Shown to Be Void on Its Face.

In 1922, in *Wisconsin R. R. Comm.* v. *C. B. & Q. R. R. Co.*, 257 U. S. 563, 42 Sup. Ct. 232, and *New York* v. *United States*, 257 U. S. 591, 42 Sup. Ct. 239, the Court construed, applied and gave full force and effect to section 13 (3) and (4) and other provisions of the act, as amended in Transportation Act, 1920.

The *Wisconsin* case was a suit brought by a railroad operating to, from, and within the State of Wisconsin against the Railroad Commission and other state officials of Wisconsin to enjoin them from interfering with the maintenance of intrastate passenger fares established by the Interstate Commerce Commission. The *New York* case was a suit brought by the State of New York and others against the United States and the members of the Interstate Commerce Commission to annul and enjoin the enforcement of an order of the Interstate Commerce Commission requiring interstate railroads operating in intrastate commerce in the State of New York to increase certain passenger fares and other charges for the purpose of bringing intrastate rates to the level of interstate rates previously fixed by the Commission. In each case the order of the Interstate Commerce Commission was sustained by the Court.

In the *New York* case the Court clearly marked the distinction as to the scope of the Court's inquiry in the two cases. The Court held that in the *New York* case,

since it was a direct attack against the order of the Interstate Commerce Commission, the evidence which was of record before the Commission could be considered by the Court to determine whether the findings and order were supported by evidence. In the *Wisconsin* case, which was of the same character as this appeal, the Court made it clear that the evidence of record before the Commission was not before the Court and could not be brought before the Court, since the cause was in legal effect a collateral attack against the Commission's order (257 U. S. at p. 600):

> "The Wisconsin Case was a suit by a railroad against the state authorities to prevent the latter from penalizing the railroad for complying with the order of the Commission. To this suit the United States and the Commission were not parties. The defense of the state authorities was *a collateral attack* upon the order, to prevail in which they were obliged to show that the order was void on the face of the findings without regard to the evidence or the absence of it." [Italics ours.]

VII.

The Attack on the Ex Parte No. 148 Order Because of Alleged Lack of Essential Findings Is Entirely Without Substance.

The cases relied upon by appellants did not involve general rate orders, but were direct attacks upon orders involving specific local rate situations. Such cases are inapplicable here where appellants to prevail must show the 1942 order to be void on its face—a complete nullity.

The cases cited in appellants' jurisdictional statement in no way impair the validity of the action which has been here authorized by the Commission and carried out by the appellee in the filing of tariffs setting up the increased charges. Each one of those cases involved a local rate

situation and in no sense took on the character of a general rate investigation such as Ex Parte No. 148. The requirements as to findings in such a case are necessarily quite different from those in a general rate investigation. In various kinds of special rate investigations and other special proceedings, this Court has pointed out the necessity for the Commission making the essential findings as to basic or quasi-jurisdictional facts. Thus, in the *Power Reverse Gear* case (*United States* v. *B. & O. R. Co.*, 293 U. S. 454, 463), under the Locomotive Inspection law the Commission had no authority to prescribe power reverse gear equipment upon locomotives unless such installations would eliminate or reduce "unnecessary peril to life or limb." The Commission's report and order in that case contained no such finding and the Court therefore held that its order prescribing such installations was void.

We have no such hiatus here, for as we have seen above, the 1925 order and the 1942 order of the Interstate Commerce Commission each contain all of the findings essential to their validity and appropriate to the action taken by the Commission in each of those instances. The findings in the 1925 order as to the inadequacy and confiscatory character of the previously existing intrastate commutation fares, the reasonableness and lawfulness of the 20% increased fares then prescribed and the necessity for bringing the level of the intrastate fares up to that of the interstate fares, still exist and continue and are now supplemented by the further findings in Ex Parte No. 148 showing necessity for and reasonableness of a further 10% increase in both interstate and intrastate commutation fares at this time.

There is evident here such a complete and adequate set of findings as would meet all tests, *even if this were a case involving a direct attack upon an order of the Commission in a special or localized rate proceeding.* It is, of course,

not necessary here to go so far in the examination of the findings here involved. We point out, however, that if it were necessary to meet a direct attack upon this order, the record here would meet the test of rules laid down in decisions such as those relied upon by appellants. Even in such cases "it is not the form but the substance of the findings and order which controls." *Quanah, A. & P. Ry. Co.* v. *United States*, 28 F. Supp. 916, 918, affirmed 308 U. S. 527; rehearing denied 309 U. S. 694.

Mr. Justice Brandeis stated the requirement as to findings correctly and authoritatively in the *Power Reverse Gear* opinion, as follows:

> "In the *Florida* case the legal distinction was pointed out between what may be termed quasi-jurisdictional findings, there held to be indispensable, and the 'complete statement of the grounds of the Commission's determination' which was declared in *Beaumont S. L. & W. Ry. Co.* v. *United States*, 282 U. S. 74, 86, to be desirable for a proper consideration of the case in the courts. The lack of such a complete statement, while always regrettable, because unnecessarily increasing the labor of the reviewing court, compare *Virginian Ry.* v. *United States*, 272 U. S. 658, 675, is not fatal to the validity of the order. It is true that formal and precise findings are not required, under § 14 (1) of the Interstate Commerce Act, which declares that the report 'shall state the conclusions of the Commission together with its decision.' Compare *Manufacturers Ry. Co.* v. *United States*, 246 U. S. 457, 487; *Meeker & Co.* v. *Lehigh Valley R. Co.*, 236 U. S. 412, 428. That provision relieves the Commission from making comprehensive findings of fact similar to those required by Equity Rule 70½. But § 14 (1) does not remove the necessity of making, *where orders are subject to judicial review*, quasi-jurisdictional findings essential to their constitutional or statutory validity." (Italics ours.) (pp. 464-465).

The foregoing quotation refers to the *Florida Log* case cited and relied upon so heavily here by appellants (*Florida v. United States*, 282 U. S. 194). That case involved rates on intrastate log traffic in a certain section of Florida and the question whether or not they were maintained at such a low level as to prejudice interstate traffic in logs between Florida and Georgia. Contrary to a statement contained in appellants' brief here, the case was one of *direct attack* and full judicial review of the Commission's order. The court pointed out that the Commission had erroneously undertaken to remove an asserted discrimination against interstate commerce by prescribing a statewide scale of intrastate log rates, without having prescribed a state-wide scale of interstate log rates or made any findings as to the revenue produced or to be produced by either the interstate rates or the intrastate rates. Hence there was no basis for the Commission's finding of discrimination against interstate commerce, and that ultimate finding standing alone in the case was held insufficient to support the Commission's order.

That was an entirely different situation than that which we have here where all basic and jurisdictional findings were made to support the discrimination order in 1925 and all basic and jurisdictional findings to support the general rate order in the 1942 revenue case were made. Furthermore, this is admittedly a collateral attack upon the orders of the Commission here involved, and all with which this Court need concern itself are the questions: Is the Interstate Commerce Commission's 1942 order, amending the 1925 order, *upon its face*, a valid order or a void order? Does it show on its face that the Commission acted within a field over which Congress had given it power to act? If so, the order must be sustained. Taking the two orders together, as must necessarily be done, their validity and adequacy in

the face of this kind of attack is clear beyond any question. For that matter they fully meet the test if taken separately.

Like the *Florida Log* case, the *Indiana Coal* case, (*United States* v. *C. M. St. P. & P. R. R.*, 294 U. S. 499) was a proceeding to enjoin the enforcement of an Interstate Commerce Commission order—a direct judicial review of the order. It involved a local rate situation entirely. The preservation of adequate rail transportation on a national railway transportation system was in no sense involved in either one of those cases. In each case the full record before the Commission, including the evidence, was before the Court for review. There is not, and cannot be, any such situation before this Court in the kind of proceeding we have here. This is made clear by the cases of *Wisconsin R. R. Comm.* v. *C. B. & Q. R. R. Co.*, 257 U. S. 563, and *New York* v. *United States*, 257 U. S. 591, above cited.

Wichita R. R. v. *Pub. Util. Comm.*, 260 U. S. 48, also relied upon by the appellants here, was another case of direct attack and full judicial review of a commission order. It was an injunction suit against the Kansas Public Utilities Commission to set aside that Commission's order permitting a utility company to increase its rates for electricity. The Commission in permitting the increase simply found that the utility "should be authorized and permitted" to do so (p. 51), without any finding that the old rates were unreasonably low or that the new rates would be reasonable—in fact, without any other finding of any kind. In holding the Commission's order void Mr. Chief Justice Taft made the following very plain statement of the legal principles which govern this subject (pp. 58-9):

> "The maxim that a legislature may not delegate legislative power has some qualifications, as in the creation of municipalities, and also in the creation of administrative boards to apply to the myriad details of rate schedules the regulatory police power of the

State. The latter qualification is made necessary in order that the legislative power may be effectively exercised. In creating such an administrative agency the legislature, to prevent its being a pure delegation of legislative power, must enjoin upon it a certain course of procedure and certain rules of decision in the performance of its function. It is a wholesome and necessary principle that such an agency must pursue the procedure and rules enjoined and show a substantial compliance therewith to give validity to its action. When, therefore, such an administrative agency is required as a condition precedent to an order, to make a finding of facts, the validity of the order must rest upon the needed finding. If it is lacking, the order is ineffective."

Since the Kansas Commission's power to take any action in that matter derived exclusively from the Kansas statute giving it the power to prescribe rates to replace rates found to be unreasonable, its order necessarily fell because on its face it was lacking in any expression showing that the Commission had acted within the scope of its authority. Such findings are those of the "basic" or "quasi-jurisdictional" character mentioned in the later cases, to some of which we have referred above. Such are the rules where the validity of an administrative body's order is being directly challenged and reviewed.

Atchison Ry. v. *United States*, 295 U. S. 193, offers nothing on the subject not already covered in the previous discussion. The basic fact upon which the Commission's decision rested could not be discerned by the Court as the report of the Commission contained conflicting conclusions in that behalf (pp. 201-2). Hence, on direct attack the order was set aside. In the *"Hot Oil"* Case (*Panama Refining Co.* v. *Ryan*, 293 U. S. 388) the President's proclamation issued without any finding of fact or statement of reason purporting to justify its issuance was rightly condemned

and held unenforceable. Sec. 9(c) of the National Industrial Recovery Act did not require any finding and it was held to be an unconstitutional attempt to delegate legislative power. These decisions like the others relied upon by appellants are inapplicable here for the reasons above stated.

Frequently Commission decisions make supporting findings as to various factual elements involved,[4] but these, while encouraged by the courts and helpful in cases of direct review, are not essential and their absence will not render a Commission decision void, even on direct review, where the decision contains sufficient, otherwise, to show that the Commission acted within the scope of its statutory authority. As stated by Judge Augustus N. Hand in *Visceglia* v. *United States*, 24 F. Supp. 355, 357, with reference to the Interstate Commerce Commission's obligations under Section 14 (1) of the Interstate Commerce Act (49 U. S. C. Sec. 14 (1)):

> "It was not necessary to make 'formal and precise findings' in a case of this type and to set out all the primary evidence that was considered, but only findings 'basic or essential.'" (Citing cases hereinabove considered.)

The contention as to inadequacy of the Commission's findings is unsound because it fails to recognize the general and legislative character of the Commission's order and the long established and approved process of rate-making as employed by the Commission in Ex Parte No. 148.

In proceeding thus to raise the general level of passenger rates 10% in Ex Parte No. 148, the Commission was acting in its quasi-legislative capacity no less than if it

[4] As we have pointed out the Commission did so in Ex Parte No. 146.

had been dealing with individual rates or groups of rates instead of dealing with the rate structure as a whole. *Arizona Grocery* v. *Atchison Ry.*, 284 U. S. 370, 387-8. As therein stated by Mr. Justice Roberts, when the Commission declares what are to be the reasonable and lawful rates for the future "it speaks as the legislature, and its pronouncement has the force of a statute" (p. 386). See also Mr. Chief Justice Hughes in *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38, 50, et seq.: "The fixing of rates is a legislative act."

It is important to bear in mind that in Ex Parte No. 148 the Commission as the agency of Congress was simply carrying out the congressional mandate and effectuating the congressional policy to provide the carriers with sufficient revenues to preserve and maintain a national transportation system adequate to meet the needs of the commerce of the United States, of the postal service, and of the national defense (Transportation Act, 1940, Sec. 1; 49 U. S. C. Sec. 1; pocket Supp., p. 3; Appendix D hereto attached). This policy originally adopted in Transportation Act, 1920, and since carried forward, frequently has been considered and commented upon in Supreme Court decisions showing that preservation of "earning capacity" of the carriers has thereby become "a matter of national concern."

Texas & Pac. Ry. v. *Gulf, Etc., Ry.*, 270 U. S. 266, 277;
Dayton-Goose Creek Ry. Co. v. *United States*, 263 U. S. 456, 478;
Western Pacific v. *South. Pac. Co.*, 284 U. S. 47, 50;
United States v. *Lowden*, 308 U. S. 225, 230.

Particularly important cogs in the legislative set-up to carry out the policy are Section 15a and Section 13, which respectively require the Commission in prescribing just and reasonable rates to give consideration "to the need of

revenues sufficient to enable the carriers, under honest, economical and efficient management to provide such (adequate and efficient) service" (49 U. S. C. Sec. 15a (2), pocket Supp. p. 114),[5] and give the Commission power to prescribe intrastate rates in order to prevent discrimination against interstate commerce. (49 U. S. C. Sec. 13(3) and (4); pocket Supp. 1, 82; Appendix B, hereto attached.)

In *United States* v. *Louisiana*, 290 U. S. 70, it is shown that these two provisions go hand in hand, one being a necessary corollary of the other if effective action on the Commission's part is to be attained in carrying out this national policy. At pages 74 and 75 of the opinion in that case it is said:

> "By § 416 of the Transportation Act, § 13 (4) Interstate Commerce Act, directly involved here, the Commission was given power to remove unjust discrimination by intrastate rates against interstate commerce, by prescribing minimum intrastate rates. This Court has consistently held that this section is to be construed in the light of § 15a (2) and as supplementing it, so that the forbidden discrimination against interstate commerce by intrastate rates includes those cases in which disparity of the latter rates operates to thwart the broad purpose of § 15a to maintain an efficient transportation system by enabling the carriers to earn a fair return."

A further fundamental unsoundness of appellants' contention here as to inadequacy of findings, therefore lies in their failure to recognize the legislative character of the Commission's action and order in Ex Parte No. 148 and the broad general scope, effect and authority thereof. Here was no case in which more specific findings were required or would have been appropriate. The findings and conclusions of the Commission, which we have summarized

[5] Appendix D, hereto.

above, covered the situation completely. The Commission's report shows that from evidence of a general nature it found the carriers needed increased revenues due to increased expenses during this emergency period; that these expenses were arising in the handling of all kinds of traffic everywhere, including passenger traffic of all kinds; that the passenger traffic should bear its share of the increased cost; that the proposed increased passenger fares would produce $45,000,000 per year and upwards; that this would be an appropriate amount for the passenger traffic as a whole to bear; that the general 10% increase should be spread upon all passenger rates subject to the Commission's jurisdiction, including those prescribed in previous Section 13 proceedings and with specific reference to the very rates involved in this case, referring to them by specific docket number; and that the exigencies of the case did not permit of further refinements such as considering the needs of individual railroads and adjusting their rate schedules separately.

Appellants' Contentions Lack Substance.

To summarize on this question of findings:

The orders of the Interstate Commerce Commission under consideration in this case are all legislative acts and as such they are not subject to restraint or modification by the courts if it appears that in issuing them the Commission acted within the scope of the legislative authority delegated to it by Congress.

Since these orders are admittedly subjected only to collateral attack here, the only concern which this Court need have with respect to findings, if, in fact, it is entitled to concern itself at all with that subject,[6] is to see whether

[6] The purpose of findings is to enable the courts in *reviewing* I. C. C. orders to "examine the evidence" and ascertain whether the Commission's

or not the respective orders contain sufficient in the way of statements or findings to indicate that the Commission acted substantially within the scope of the legislative authority delegated to it.

It appears very definitely and affirmatively in the recitals and terms of the orders here involved that the Commission in each instance was acting well within the scope of its authority. In the 1925 order it not only set forth the quasi-jurisdictional finding of discrimination against interstate commerce, but included several pertinent supporting findings. The same is true of the 1936 order (*Passenger Fares and Surcharges*, 214 I. C. C. 174), and again of the 1942 order, wherein general regulatory control over passenger fares throughout the nation was exercised. In the 1936 order the general level of fares was required to be reduced, the order being accompanied by a voluminous report, with a summary of 14 specific supporting findings, followed by the Commission's conclusions thereon (214 I. C. C. at pp. 253-7). The scope and context of the findings and conclusions shows very positively that the Commission was there exercising its continuing regulatory power over all groups of intrastate rates of which it had previously taken jurisdiction in certain specified cases such as the specific case involved in the 1925 order here, Docket No. 11703, *Intrastate Rates Within Illinois*. (59 I. C. C. 350 and 102 I. C. C. 479.)

Again, in the 1942 order here attacked by appellants (Complaint, Exhibit B), the quasi-jurisdictional findings are present in the order itself, affirmatively showing that the Commission acted well within the scope of its author-

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"findings are properly supported." *Indiana Coal Case*, 294 U. S. 499, 504-5. *Power Reverse Gear* case, 293 U. S. 454, 465, *supra*. It may well be doubted that the question is properly raised, in any aspect, on collateral attack. We find it unnecessary to stand on this point, as the findings here are ample in any event.

ity in carrying out the congressional mandate to permit the maintenance of rates, fares, and charges which will enable the railroads to continue rendering adequate and efficient railway transportation service necessary to the national defense during the present emergency. And again, in the Commission's report covering the freight rate increases as well as the passenger are found statements of the facts and findings supporting the basic or quasi-jurisdictional findings. These findings are intrinsically applicable to both interstate and intrastate rates of which the Commission had jurisdiction, and the order specifically so applied them. So there might be no question about this the Commission made specific references to its orders in previous section 13 cases, including Docket No. 11703, and expressly modified its outstanding orders in those cases, taking care to leave in effect absolutely everything about those orders except what was necessary to permit the 10% increase to be carried into effect by the filing of appropriate tariffs. In effect, the action of the Interstate Commerce Commission in thus amending the 1925 order by ordering a copy of the 1942 order filed in the docket of the 1925 proceeding, was a reaffirmation of the 1925 order in a form amended only to permit the raising of the rate level ten per cent.

The foregoing, we believe, demonstrates effectively the lack of substance in appellants' point as to the inadequacy of findings in the 1942 order. This is further demonstrated by reference to that part of appellants' statement herein entitled "The Application of the Foregoing Authorities to the Findings in the Instant Case." There the only specific complaints made as to lack of findings are these:

1. That there was "no finding of fact showing that the rates before the authorized increase were confiscatory"; and

2. That the findings did not "indicate the 'extent' of the inadequacy of the previous rate structure or 'expected loss' or deficit to be anticipated from the previous rates."

In fine, appellants' contentions narrow down to the proposition that the absence of these specified findings has denied them due process of law. Such is the final assertion in their behalf and they endeavor to give it force by quoting excerpts from the decisions which we have analyzed above, which they characterize as "independent proceedings in equity."

That any finding in the Ex Parte No. 148 order, as to rates being confiscatory, would have been entirely inappropriate and beyond the scope of the investigation in that proceeding is obvious in view of the nature of the proceeding. The carriers in proving their need for increased revenues to meet the huge wage increase and other expense suddenly imposed upon them in excess of $350,000,000 per year had no occasion to attack the previously existing general rate level as confiscatory. The only issue before the Commission was whether or not the carriers would need a general rate increase in order that they might function properly during the war and be enabled to render needed transportation for the nation during the emergency period. The facts found by the Commission showed the need. Authority to make the increase in rates was granted by the Commission precisely as the Congressional mandate required (49 U. S. C. Sec. 1 and Sec. 15a, supra). The Commission in its report said:

> "The increases herein authorized grow out of the emergency caused by the war, and our authorization will be limited to that emergency." (Sheet 48.)

Likewise, there was no occasion for the Commission to make any findings as to the extent of inadequacy of the

then existing rate level or any expected loss or deficit. The Commission found these huge increased costs had been suddenly imposed upon the carriers. These were out-of-pocket costs. The need for more revenue was plain and imperative. The only question was "how much." The Commission in its discretion granted less than was estimated to meet the increased costs, but granted prompt relief.

The finding in Ex Parte No. 148 must be found sufficient even if the appellants here were in a position to raise the point as they might have done by filing a complaint in equity to review the Commission's order. (The State of Illinois was notified and made a party in Ex Parte No. 148.) Had appellants done this, they would have placed themselves in the position of those litigants who were complaining in the several cases which appellants have cited here—they would then have been in a position to raise these questions. Having failed to take that course, appellants must accept the Commission's order at face value, as, indeed, it has been and is being accepted throughout the land.

To hold otherwise would not only do violence to all the applicable principles of administrative law, but would seriously cripple many of the more important units in the national system of rail transportation. Appellee's railroad is among those carriers (whose mileage is more than 30% of the total United States rail mileage) now being reorganized under Section 77 of the Bankruptcy Act. If, as appellants claim, the 1942 order is void on its face, it must follow that all rates purported to be increased pursuant to its authority are unauthorized. A serious transportation crisis would quickly develop. It was to avoid such crises that Congress enacted the statutes to which we have referred.

VIII.

The Claim That the Ex Parte No. 148 Order Does Not Purport to Authorize These Increased Rates Is Disproven by the Plain Terms of the Order, Which Are Confirmed by a Later Order of the Interstate Commerce Commission.

Adopting the devious argument of the *Transit Commission* case, appellants contend the effect of the Ex Parte No. 148 order was merely to withdraw generally Interstate Commerce Commission opposition to increase in intrastate rates. The argument is built up to that point by taking the word "permit" (used in the order) out of its context and giving it a literal and independent meaning. To support their conclusion the false premise is indulged in that there existed some Federal opposition to increases in intrastate rates—an assumption belied by the whole tenor and effect of the Interstate Commerce Commission's report and order.

The Federal Government represented by the agency of Congress fully authorized to act, here determined the necessity for increasing *all* passenger fares, both *inter*state and *intra*state. It went further. It specifically provided for the increase of certain intrastate fares of which it had previously taken jurisdiction by amending its orders previously entered and then outstanding so as to provide for such increase. The amending order was, by its terms, required to be filed in the docket of each proceeding in which those previously entered orders had been made. Such filing having been made, thereby the outstanding orders were modified. This was followed by specific reference to Section 13 cases in which the Commission then held jurisdiction over intrastate rates (including those here involved). Its outstanding orders respecting these rates were singled out as a class from all other outstanding

orders, to make doubly sure the Commission's intention and desire to provide the 10% raise of *intra*state as well as *inter*state rates subject to its jurisdiction.

Surely it is perversion itself to suggest, as is here suggested, that the word "permit" was used to indicate a withdrawal of Federal opposition of some vague kind or other to the proposed increase in these intrastate rates. For that matter, what objection could the Federal agency *ever* have in *any* case against intrastate rates being brought up to, or maintained, on a level of equality with, interstate rates? The provisions of Section 13 (3) and (4) giving it jurisdiction over intrastate rates prove the Commission could only have objections in cases where intrastate rates were being reduced or maintained at a level *below* the interstate rates.

The further conclusion of the New York Judge that the word "permit" was used so that the carriers would be free to make increased fare applications to state regulatory bodies is even less worthy than the first assumption. There was, of course, no permission of the Interstate Commerce Commission needed by any carrier to enable it to make increased rate applications to state authorities.

There is no difficulty in understanding the Commission's use of the word "permit" in the context of its order wherein it amended its previous outstanding orders, when one considers for a moment the mechanics of this rate increase. Ex Parte No. 148 being a general proceeding and having been initiated by the carriers in advance of their filing of any tariffs, the Commission's order itself necessarily could not establish the increased rates and fares. That could only be accomplished by the subsequent action of the carriers in filing new or supplemental tariffs with respect to the very great number of rates and fares in existence all over the country and set forth in numerous

existing tariffs already on file. The carriers' petition in Ex Parte No. 148 was in the form of a request for permission from the Interstate Commerce Commission to file such new or supplemental tariffs naming increased charges. This is shown by the very first paragraph of the Commission's report, which states that the railroads "ask us to make certain orders necessary to enable them to increase their rates, fares and charges." And the order itself points out some particulars as to how the permitted tariffs or supplements may be submitted and filed and the time when they may become effective.

In other words, instead of proceeding as is customary with respect to local or group rate changes by filing tariffs or tariff supplements, and then waiting to see whether or not opposition develops and the tariffs are suspended pending hearing and consideration by the Interstate Commerce Commission, the carriers here proceeded by the other method which we have pointed out had been expressly approved by the Supreme Court in other general cases. That is to say, the carriers sought permission and approval of their proposed tariffs in advance. Hence, the use of the word "permit," a perfectly well chosen word in the situation in which it was used.

The New York judge also fell into error by attaching an undue significance to that part of the recitals in the Interstate Commerce Commission's 1942 order which states that "* * * similar application has been or will be made to the regulatory authority of the respective States for permission to increase similarly petitioners' intrastate rates, fares and charges, * * *." Such applications were necessary as to the great residuary body of intrastate rates and fares of which the Interstate Commerce Commission has never had occasion to take Section 13 jurisdiction. Not all states refused after 1920 to raise

the level of intrastate rates to conform to that of the interstate rates. Those that did not so refuse still have jurisdiction over their own state rates. They will continue to have it unless and until there is occasion to file a Section 13 complaint and obtain a finding of undue discrimination against interstate commerce. Hence the necessity for petitions to state authorities as to a great mass of intrastate rates *not, however, including those as to which Section 13 orders already were outstanding.* The propriety of the recital is therefore evident. Its presence in the order is completely accounted for without involving the wholly mistaken assumption made by the New York judge that it is indicative of an intent by the Interstate Commerce Commission that the carriers would go back to the State Commissions even in the Section 13 instances.

To adopt appellants' contention would render completely ineffective that very substantial part of the Commission's order in Ex Parte No. 148 which authorizes the 10% increase in intrastate passenger fares of which it had previously taken jurisdiction under the congressional mandate of Section 13, Interstate Commerce Act. No less than 22 such cases are listed by docket number in the 1936 order of the Interstate Commerce Commission, and included by specific reference in the 1942 order. Among them is Docket No. 11703, involved here. To so construe this order as to nullify such a substantial portion of it would do violence alike to common sense and the legal principles to which we have referred above.

If any doubt ever existed about the *intent* of the Interstate Commerce Commission's 1942 order, that doubt has been completely dispelled by the Commission's own action through its order of March 24, 1942, in Docket No. 11860, *Montana Rates and Fares*, Appendix A hereto. It is seen therefrom that a Section 13 order entered in 1921 had

required the maintenance of intrastate fares on the same basis as interstate fares in Montana; that in 1938 the Interstate Commerce Commission finding that the State authority then had adopted the same bases of fares as those which it required interstate, vacated its 1921 order because it no longer served any necessary or useful purpose; and that in view of the disparity between the Montana intrastate rates and the proposed increased interstate rates under the order in Ex Parte No. 148, the vacation of the old 1921 Montana order has now been set aside and it has been revived so as to "protect" the Montana intrastate rates and make them subject to the present 10% increase, the same as the interstate rates. The present situation in Montana is specifically found to justify "the continued maintenance and observance of" the 1921 order as modified. If, as appellants claim, the order in Ex Parte No. 148 was merely a permission to the carriers to go back to State Commissions where Section 13 orders were outstanding, no action at all by the Interstate Commerce Commission would have been necessary in the Montana situation, *because there was no outstanding Section 13 order, the original one having been vacated.* But the Commission, by *reinstating* the Section 13 order previously vacated, put the Montana intrastate fares up to the interstate level through the application of Ex Parte No. 148 in precisely the way that these Illinois intrastate commutation fares were increased.

This demonstrates, perhaps more forcefully than anything we might say, the Interstate Commerce Commission's belief and intention as to the validity and effectiveness of its order here in question, as respects its applicability to increases in intrastate rates already within its control under Section 13. There is and can be nothing substantial in appellants' contrary contention.

IX.

By Its So-called Suspension Order the Appellant Commission Attempted to Establish Passenger Fares Insufficient to Meet Appellee's Cost of Rendering the Service and Hence Confiscatory.

The Interstate Commerce Commission found in its 1925 order (Complaint, Exhibit A) that the 20% increase in Illinois intrastate commutation fares thereby permitted would still fail to produce sufficient revenue to fully meet the cost of rendering the service. The complaint herein shows that the expenses necessarily incurred in furnishing this service have greatly increased since 1925; that heretofore appellee has been furnishing the service at a total expense considerably in excess of the total revenues derived therefrom; and that when the complaint was filed (after the effective date of the increased fares here involved) the service was still being furnished at a loss and without any return upon the value of the property used by appellee in rendering the service (Complaint, Sections XIV and XV).

The Court found that the purport and effect of the appellant Commission's order of February 18, 1942, is to prescribe fares for the appellee at the previously existing noncompensatory level and to prohibit the appellee from increasing or modifying those fares unless and until permitted to do so by further order of the appellant Commission at some indefinite time in the future; that the fares thus prescribed would not produce sufficient revenue to meet the cost of the service; that for some years such service had been rendered by appellee at a loss and without deriving any return whatsoever upon the value of the property devoted to the service; and that even with the increase therein made effective March 8, 1942, as authorized by the Interstate Commerce Commission, the appellee is still realizing a loss from

this service and deriving no return whatsoever upon the property investment. (Findings 11-13, inclusive.) The Court concluded that enforcement of the appellant Commission's order imposing these confiscatory rates would deprive appellee of his property without due process of law in violation of Amendment XIV. (Conclusion 5.)

X.

The Passenger Fares Thus Sought to Be Imposed by Appellants Were Properly Enjoined Because of Their Clearly Established Confiscatory Character and Quite Independent of the Other Grounds Amply Supporting the Injunction Order.

The appellant Commission's order (Complaint, Exhibit C), called a "suspension order," undertook to establish these admittedly confiscatory rates "until the period of suspension and any extension thereof has expired." The immediate period of suspension stated in the order was until July 6, 1942. However, that Commission is given authority under Section 36 of the Public Utilities Act of Illinois to extend this suspension period for an additional six months. (Complaint, Section X; Appellant's Jurisdictional Statement, p. 4.)

In *Prendergast* v. *N. Y. Tel. Co.*, 262 U. S. 43, 49-50, where it was shown that rates yielding less than a fair return were sought to be imposed on a temporary basis pending further procedure before the New York Commission, it was specifically held that the temporary character of the rates would not deprive the company of its right to relief at the hands of the court. Referring to the New York Commission's orders prescribing those temporary rates, the Court said (p. 49):

"They were final legislative acts as to the period during which they should remain in effect pending the final determination; and if the rates prescribed were confiscatory the Company would be deprived of a reasonable return upon its property during such period, without remedy, unless their enforcement should be enjoined. Upon a showing that such reduced rates were confiscatory the Company was entitled to have their enforcement enjoined pending the continuance and completion of the rate-making process."

Again in *Northern Pacific* v. *Department of Public Works*, 268 U. S. 39, where the rates fixed by the Washington State Commission were for an experimental period of twelve months and where the carriers showed the rates so fixed would not yield sufficient revenue to meet fully the operating expenses, the Court, in holding the carriers entitled to an injunction, said (p. 45):

"The invalidity was not avoided by making the order, in terms, for an experimental period. The rates as to which the evidence was primarily directed were those in force before and during the hearings. If even the existing rates were confiscatory, as the carriers' evidence embodying the results of ample experience tended to show, there could be no reason for awaiting the test of the much lower rates which were prescribed. The cases which applied the principle of awaiting the result of an experimental period for untried rates have no application here." (Citing cases.)

Believing these decisions state sound legal principles fully applicable to the instant case, appellee asserts that here is an additional and independent ground upon which the lack of substance in this appeal clearly appears.

Wherefore, appellee respectfully submits this statement showing that the questions upon which the decision of this cause depends are so unsubstantial as not to need further argument and appellee respectfully moves the Court to

dismiss this appeal, or, in the alternative, to affirm the decree of permanent injunction entered below.

CHARLES M. THOMSON,
Trustee of the Property of
Chicago and Northwestern
Railway Company,
Plaintiff-Appellee.

By WILLIAM T. FARICY,
NYE F. MOREHOUSE,
P. F. GAULT,
His Attorneys.

June 9, 1942.

APPENDIX A.

ORDER.

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 24th day of March, A. D. 1942.

No. 11860.

MONTANA RATES AND FARES.

In the Matter of Intrastate Rates and Fares of the Chicago, Burlington & Quincy Railroad Company and Other Carriers in the State of Montana.

It appearing, That the Commission on March 31, 1938, made its order in the above-entitled and other proceedings therein listed requiring the parties to the respective proceedings to show cause on or before May 4, 1938, why orders previously entered in such proceedings and still outstanding should not be vacated and set aside in so far as they require the continued maintenance and observance of the rates, fares, charges, allowances, rules, regulations, or practices separately prescribed in said outstanding orders;

It further appearing, That with respect to this proceeding the said order of March 31, 1938, had reference to the outstanding order of January 11, 1921, as modified, made upon report appearing at 60 I. C. C. 61, which latter order prescribed for the removal of the unlawfulness therein found, the interstate bases of fares for the transportation of passengers, of excess-baggage charges, and of surcharges upon passengers traveling in sleeping cars and parlor cars, for application on intrastate commerce within the State of Montana, because the interstate bases in effect when said order of March 31, 1938, was made were on the same or practically the same bases as required by State authority, and that therefore the continuance in force and effect of said outstanding order served no necessary or useful purpose;

It further appearing, That no return was filed by any party to said order of March 31, 1938, whereupon the Com-

mission on June 6, 1938, made its order in all those proceedings by which all said outstanding orders, in so far as they required such continued maintenance and observance, were vacated and set aside;

It further appearing, That the railroad carriers operating within the State of Montana, by petition solely in this proceeding filed February 4, 1942, inform the Commission that through oversight these petitioners failed to show cause in response to said order of March 31, 1938, why said order of January 11, 1921, should not have been vacated and set aside, and aver that for this reason the intrastate passenger fares in Montana are technically no longer protected by an outstanding order made pursuant to section 13 of the Interstate Commerce Act; that by order of January 21, 1942, in Docket Ex Parte No. 148, *Increased Railway Rates, Fares, and Charges, 1942*, this Commission approved increased passenger fares, reflecting an increase of 10 percent over then present fares, as proposed by railroads throughout the United States, which increased fares became effective February 10, 1942, on interstate traffic, and that said order of January 21, 1942, modified all outstanding orders to the extent necessary to permit the increase authorized by said order of January 21, 1942, to be added to the interstate and intrastate fares approved or prescribed in, or maintained or held by virtue of, said outstanding orders; and that, inasmuch as said order of January 11, 1921, has been vacated, and a statute of the State of Montana prescribes a basis for maximum fares which would be exceeded if the Montana intrastate fares were all increased by 10 percent, petitioners pray that the Commission reinstate said order of January 11, 1921, upon the ground that the latter order was vacated improvidently by said order of June 6, 1938;

It further appearing, That no reply to said petition has been received from any party, although the petition was duly served upon all parties by these petitioners by mailing a copy to each of them;

And it further appearing, That the existence of said statute affords good cause for the continued maintenance and observance of said order of January 11, 1921, as modi-

fied, and that therefore said order of June 6, 1938 was made improvidently:

It is ordered, That said order of June 6, 1938, in so far as it relates to this proceeding, be, and it is hereby, vacated and set aside; that said order of January 11, 1921, as modified prior to June 6, 1938, is restored and reinstated; and that this order shall take effect April 4, 1942.

By the Commission.

W. P. BARTEL,
Secretary.

[SEAL.]

APPENDIX B.

Interstate Commerce Act, Section 13.

(3) Whenever in any investigation under the provisions of this part, or in any investigation instituted upon petition of the carrier concerned, which petition is hereby authorized to be filed, there shall be brought in issue any rate, fare, charge, classification, regulation, or practice, made or imposed by authority of any State, or initiated by the President during the period of Federal control, the Commission, before proceeding to hear and dispose of such issue, shall cause the State or States interested to be notified of the proceeding. The Commission may confer with the authorities of any State having regulatory jurisdiction over the class of persons and corporations subject to this part or part III with respect to the relationship between rate structures and practices of carriers subject to the jurisdiction of such State bodies and of the Commission; and to that end is authorized and empowered, under rules to be prescribed by it, and which may be modified from time to time, to hold joint hearings with any such State regulating bodies on any matters wherein the Commission is empowered to act and where the rate-making authority of a State is or may be affected by the action taken by the Commission. The Commission is also authorized to avail itself of the cooperation, services, records, and facilities of such State authorities in the enforcement of any provision of this part or part III.

(4) Whenever in any such investigation the Commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding.

APPENDIX C.

Report of the Commission.

By the Commission:

In petitions filed in December 1941, heard in this proceeding, the carriers by railroad subject to our jurisdiction ask us to make certain orders necessary to enable them to increase their rates, fares, and charges in interstate or foreign commerce by 10 per cent, except by specific amounts the rates on coal, coke, and iron ore. Similar petitions were filed on behalf of certain common carriers by water.

Hearing was held in St. Louis, Mo., beginning on January 5 and ending January 9, 1942, and the case was submitted to us upon briefs and oral argument on January 14.

Petitioners indicated an intention to make like increases upon intrastate traffic. All the States were notified by us of the pendency of the proceeding. In accordance with section 13(3) of the Interstate Commerce Act we sought the

cooperation of the State commissions. Their committee, consisting of Commissioners McConnaughy of Ohio, Eichhorn of Indiana, Darby of South Carolina, Jourelmen, Jr., of Tennessee, Murphy of South Dakota, Keshlear of Iowa, Betts of Arizona, and Riley of California, sat with us throughout the hearings and oral argument, and has conferred with us as to the determination of the issues. We are authorized to state that a substantial majority of the members of the cooperating committee are in general accord with the conclusions expressed herein.

Wage Increases and Proceedings Leading Thereto.

The rail carriers' request was made shortly after agreements involving certain increases in the wages of railroad employes became effective. Proposals for wage increases were made in May 1940, followed by counter proposals and proposed changes in rules initiated by certain carriers, and further proposals by employe organizations in 1941 for the increase of all basic wage rates. Attempts to mediate the disputes failed and a strike of operating and non-operating employes was called effective on specified days in September 1941.

An Emergency Board named by the President held extensive hearings, and, on November 5, 1941, submitted its recommendations to the President. The railways signified their willingness to accept the recommendation. Some of the board's major recommendations were rejected by the groups of employes, and on November 13 the operating group issued a strike call, effective in December.

Following the failure of further unsuccessful negotiations by the parties, and further hearing before the Emergency Board, that board attempted mediation, and evolved the agreement already referred to. It provided for a wage increase of 9.5 cents per hour in basic hourly wage rates, equivalent to an increase of 76 cents per day, to employes of the five operating organizations; an increase of 10 cents per hour, or a basic daily wage increase of 80 cents in basic hourly wage rates, to employes of the fourteen non-operating organizations. The pay increases were to become effective December 1, 1941, and the employes were to receive

retroactive pay for the period from September 1 to December 1, 1941, based upon the wage recommendations set forth in the Emergency Board's original report of November 5, 1941. The agreement provided that the wage changes described were to be increases in basic rates of pay and not temporary, and it assured a vacation of six consecutive work days with pay for all employes in the fourteen non-operating organizations of the railroads represented at the hearings before the Board. The recommendation in its report of November 5 of a basic minimum wage scale of 40 cents per hour for employes of certain short lines was reaffirmed.

Petitioners' Proposals.

Class I railroads.—The first petition was filed December 13, 1941, by substantially all class I railroads of the United States and some railroads of other classifications. They request authority to increase immediately their freight rates and charges and passenger fares in the manner and to the extent therein set forth. The increases sought are generally stated as follows:

Passenger.—A uniform increase of 10 per cent in all fares, including rates and charges for milk and cream and articles grouped therewith as published in passenger tariffs, except that no increase will be made in fares specially published for application to members of the military or naval forces of the United States traveling on furlough, and no increase will be made in the amounts published as extra fares applicable in connection with particular trains.

Freight.—A uniform increase of 10 per cent in all freight rates, except those on coal, coke, and iron ore; and in accessorial charges with certain exceptions. The proposed increase on the excepted commodities, which were in cents per 100 pounds, and the proposed rules, are shown in detail in appendix 1 to this report.

Petitioners assert that they recently incurred certain unavoidable and continuing increases in their operating costs, which are so substantial that, unless promptly offset by increases in revenues, their financial resources will be seriously impaired and their ability to continue to render adequate and efficient railway transportation service will

be greatly endangered. Reference is made to the increases in wages for all class I railroads, estimated to amount to approximately $311,711,000 per year, resulting from the mediation agreements referred to previously.

In addition to the increases in wages described, petitioners state that they will find it necessary to make readjustments in the wages of employes not covered by the mediation agreements, which will result in increasing their operating costs probably more than $20,000,000 a year. There have been advances recently in the prices of many materials and supplies, and the petitioners expect such higher prices will continue or be increased in the future. The amount of the total advance in prices, while not estimated, is said to be substantial.

Upon recommendation of the War Department the petitioning railways are taking precautionary measures to safe-guard their properties and operations during the continuance of the present war, and, as a result thereof, are said to be confronted with increases in their operating costs of not less than $30,000,000 a year. As the result of the war they are being called upon frequently, in connection with the transportation of troops and property for the United States, to perform many special and unusual services, which add to their costs, and for which no compensation is included in the normal tariff charges on such movements. No approximation is made of the amount by which operating expenses will be increased as a result of the situation described.

The petitioners allege that because of the increases in expenses referred to their rates, fares, and charges are insufficient to yield revenue over and above operating costs necessary to insure their ability to continue in the public interest the adequate and efficient service contemplated by section 15a of the act. If the increased costs referred to had existed during the year ended September 30, 1941, the aggregate net railway operating income of class I railroads for that period would have exceeded their fixed charges for the same period by only a relatively small amount, and many of such railroads would not have earned their fixed charges, according to the petition.

These increased operating costs are described as general in character and as applying to all traffic handled by them. Petitioners assert that the only practical method by which they may obtain the necessary added revenue is by a general percentage increase in all their rates, fares, and charges, with certain limitations and modifications as to particular classes of traffic. They accordingly pray for authority to make the increases hereinbefore described, including international and joint rail-and-water and rail-and-truck rates, fares, and charges.

It is alleged that the increases proposed will not result in rates, fares, or charges that are unreasonable, or in a loss of traffic to an extent that will deprive them of a substantial net increase in revenue. Such increases the petitioners assert, are necessary to enable them to continue to provide the adequate and efficient transportation service demanded in the interest of the general welfare and national defense.

On the basis of traffic, both interstate and intrastate, moved during 1941 and moving when the petition was filed, allowing for readjustments required by commercial and traffic conditions, petitioners estimate that the proposals will yield increased revenue for all class I railroads of about $356,956,000 per year.

We are asked, after suitable investigation, speedily to determine and find that the proposed increased rates, fares, and charges will be just and reasonable, and not in excess of the maximum necessary in the public interest to enable petitioners to continue to provide the transportation service contemplated by law and required by the present national emergency; and to make such findings and orders as would permit petitioners without our further order to make revisions in the increased rates which we might authorize, in the manner and to the extent outlined in the petition. In order to make such authorization effective, it will be necessary for petitioners to have permission to make such increases effective on short notice, by simple forms of supplements to existing schedules. It will also be requisite that we modify our outstanding orders to the extent necessary to permit them to make effective the increases approved by

us, and to enter orders authorizing departures from section 4 of the act.

Short line railroads.—The American Short Line Railroad Association for its members supports the petition of the class I and other carriers, and asks for similar authority.

The allegations as to the increase in operating expenses and need for relief by way of increases in freight rates and charges and passenger fares, are similar to those in the original petition of the class I roads. Some of these petitioners claim to be experiencing a lessening in their volume of traffic, caused by a shifting from commercial to government traffic, and inability of industries served by them to obtain materials and supplies.

Such of the Short lines as are subject to Investigation and Suspension Docket No. 11, *The Tap Line case*, pray that we modify our order of July 11, 1922 (Seventh Supplemental Order), prescribing a scale of switching allowances, so as to increase such allowances by the amount of any increase authorized applicable to lumber and forest products, so that petitioners may retain their proportionate share of the additional revenues resulting from such increases.

Other petitions in intervention.—Subsequent to the filing of the original petition of class I railroads, a number of petitions were filed by carriers of property by rail or by water, based upon the same general allegations as to their financial needs, brought about by increases in costs due to recent wage increases, advancing prices of materials and supplies and the adverse effect of war conditions upon operating efficiency and economy. The relief sought is in general the same character and extent of authorization for the interveners as we should accord to class I railroads, with which the interveners connect or compete. The following are the petitions referred to:

Supporting Petitions.

Supplementing petitions supporting the initial petition, petitions have been filed by the Southern Traffic League and the American Trucking Associations, Incorporated.

The league recognizes that the railroads are facing an emergency and may need additional revenue as alleged. Its petition in addition to making certain suggestions as to our procedure, urges us to grant increases only to the extent justified by the evidence, and to require publication of any approved increases only as emergency charges with an expiration date; and that we shall thereafter continue the proceeding with further hearings to permit interested parties to be fully heard respecting the lawfulness of the general increase as applied to particular traffic, and whether the increase should be in flat amounts or *per centum*.

The American Trucking Associations, Incorporated, composed of fifty affiliated associations throughout the United States, calls attention to the relation of motor-carrier economics to the proposed rail-rate increases in considering the issues herein.

Value of Common Carrier Railway Property.

The petitioners do not regard any issue as to the fair value of the property as necessarily involved.

We have received in evidence data prepared by our Bureau of Valuation, as to the elements of value as defined in section 19a of the act, of the property used in common-carrier service by the railways of the United States, as of January 1, 1940, the latest available date for such a study.

From our study of the record, it does not seem necessary for our determination to enter into a discussion of the value of the common-carrier property of the petitioners. The proceeding has not taken on the aspects of a "fair return" case. As stated by counsel for the class I petitioners at the opening of the hearing, this is a revenue case, not a rate case.

Financial Evidence.

For petitioners generally.—In 1940, and especially 1941, the class I railroads experienced a recovery in gross and net earnings from the generally lean years 1931-1939. Complete returns for the calendar year 1941 were not available at the hearing, but petitioners presented the financial results of operation for the year ended October 31, 1941, in

comparison with those of preceding years. In brief, the results were as follows:

Item	Average 1921–1930 (Millions)	Average 1931–1940 (Millions)	Calendar year 1940 (Millions)	Year ended Oct. 31, 1941 (Millions)
Operating revenues, total	$5,960	$3,721	$4,297	$5,167
Operating expenses, total	4,503	2,769	3,069	3,502
Taxes	351	304	396	536
Net Railway operating income	999	519	682	997
Net income	619	40	189	495

The net railway operating income of $999,500,000, which is the net after deducting operating expenses and taxes, but before deduction of fixed charges, for the 1941 period is nearly the same as for the ten-year average 1921-1930. A reduction of one billion dollars in expenses almost offsets the decline in revenues and growth of taxes. The net income for the 1941 period compares unfavorably with the average net income of the 1921-1930 period.

We may observe that while taxes have been deducted in stating net railway operating income in the foregoing table, we have held that

> * * * railway corporations should, like other corporations, pay their federal income taxes out of the income, rather than collect it, in effect, from the public in the form of transportation charges adjusted to enable it (them) to retain the designated fair return over and above the tax.

Reduced Rates, 1922, 68 I. C. C. 676, 683. Included in the item "taxes" in the foregoing table, for 1941, is approximately $171,000,000 of Federal income taxes.

The number of revenue ton-miles in 1941 was greater than the average for the 1921-1930 period and exceeded even the 1929 peak, but the revenue per ton-mile continued to decrease generally after the 10 percent reduction in freight charges in 1922. It was 0.944 cent in 1941 (year ended September 30), compared with 1.11 cents for the 1921-1930 average, a reduction of 15 percent. The reduction was in part the result of rate changes and due in part to other causes. The number of revenue passenger-miles did not reach the average for the 1921-1930 period in 1941

(year ended September 30), and the revenue per passenger-mile for 1941 was less by 40 percent.

The revival of net earning power of the railroads in 1941, was checked near the end of the calendar year by the increase in the rates of pay of railroad employes hereinbefore described. The annual cost of the higher basis of pay effective December 1, 1941, was estimated as follows by a witness for the carriers, who assumed an employment equal to that for the calendar year 1941. This applies to railroads of class I.

Operating employes covered in agreements	$69,250,000
Nonoperating employes " " "	199,874,000
Increase in payroll taxes	16,147,000
Vacations to nonoperating employes	26,500,000
Probable increase to other employees	20,000,000
Total	331,771,000

This estimate makes no allowance for the fact that the payroll is chargeable in part to capital account. Since as expenses increase profits decrease, income and excess profits taxes are thereby reduced. It is probable that in the aggregate the decrease in income taxes on this account is nearly equal to the additional payroll taxes, but this would vary greatly among individual carriers. The increases to employes not covered by the agreements have not yet been incurred. Whatever may be the outcome as to these two items, it is clear that some $300,000,000 has been added to the operating expenses of the class I railroads for a year like 1941 because of the advance in wages. This is 5.81 percent of the operating revenues of the 12 months ended October 31, 1941.

Petitioners estimated the increase in operating revenues which would result from the proposed increases in rates and fares at $358,811,000 for a volume of traffic equal to that of 1941. The estimated amount and percentage of the proposed increase in revenue may be summarized under the following heads, but it is to be remembered that the traffic assumed for the purpose of the estimate is that which was carried in 1941. The petitioners have made no

similar detailed estimate as to the volume or character of their future traffic.

Item	Estimated amount of 1941 revenue	Estimated amount of increase from proposed charges	Percent of increase expected
1 Bituminous coal	$512,392,000	$18,491,000	2.5
2 Anthracite	13,879,000	2,588,000	2.25
3 Coke	33,841,000	1,076,000	3.2
4 Iron ore	120,620,000	8,583,000	7.1
5 Total, 4 groups	1,010,732,000	30,737,000	3.0
6 All other freight revenue	3,517,049,000	281,364,000	8.0
7 All commodities	4,527,781,000	312,102,000	6.9
8 Passenger revenue	508,234,000	45,741,000	9.0
9 Milk revenue	9,678,000	968,000	10.0
10 All other revenue	279,307,000	[1]	
11 Total operating revenue	5,325,000,000	358,811,000 [2]	7.1

[1] None specified.
[2] Computed without regard to Item 10.

With respect to the efficiency and economy of the operations of the petitioners, we have a showing over a series of years of increased capacity of equipment and freight trains, of larger numbers of gross ton-miles per train-hour and per ton of fuel consumed, and of reduction in expenses per ton-mile.

The statistical presentation by petitioners was taken together for all districts, the same percentage of increase in charges being requested for all districts, except for the special treatment of coal, coke, and iron ore. Data of record permit of a test as to the extent to which this is justified. For the calendar year 1941 the net earnings of class I railroads, by regions, were as follows:

	Net railway operating income Calendar year 1941
Eastern district	
New England region	$35,663,397
Great Lakes region	164,378,811
Central Eastern region	197,767,415
Total	397,809,623
Southern district	
Pocahontas region	92,042,384
Southern region	138,673,395
Total	230,715,779
Western district	
Northwestern region	123,862,011
Central Western region	167,114,840
Southwestern region	80,000,653
Total	370,977,504
Total—All districts	999,502,906

Reference also was made to advances in prices of materials during the year 1941 of 9.8 percent, and further rises in material prices in 1942, and to certain extraordinary expenses amounting to perhaps $70,000,000 expected to be incurred in connection with protecting railway property against war sabotage. The probable need of financing the cost of acquiring as many as 144,000 new freight cars and other equipment during 1942, requiring an estimated $150,000,000 outlay for installment and interest payments in 1942, was emphasized. Maintenance also would have to be continued at a reasonably high level in 1942 because of the unusual traffic demands.

The carriers were unable to supply information as to the extent to which their revenues would be depressed in 1942 on account of the rate concessions which must be made on traffic over land-grant routes and routes competitive therewith. Heavier loading of all freight traffic per car in war time partially off-sets the effect of the land-grant deductions on a part of the traffic. The average load measured in per loaded freight-mile was 28.4 for the 11 months ended with November 1941 compared with 27.7 one year earlier.

Notwithstanding the prospect of increased traffic emphasized by carriers as the cause of probable heavy additional expenditures in 1942, as previously suggested, they make no estimate of the probable effect of the increase in traffic on their net revenues.

Increased revenues from expected greater traffic volume.—Although not part of petitioners' case, it seems appropriate to inject here a discussion of the estimate submitted by one protestant as to the increase in revenues which could be expected because of the prospective greater volume of traffic due to war needs. Briefly, the estimate is that if revenues increase on account of greater traffic to the extent of 10 per cent over 1941, the net railway operating income would be $849,895,455 for 1942 without an increase in rates or fares, and if the revenue increase is 20 per cent, the net railway operating income would become $995,262,571. Such operating results would permit of a coverage of fixed charges by a substantial margin, if these be con-

sidered as actually accrued, or by a wider margin if diminished by the probable effect of railroad financial reorganization. In the constructive income account allowance was made for the higher wage level in 1942, but no specific allowance was included for higher prices of materials. However, it was developed that no allowance had been made on the principle that, other things being equal, an expansion in business tends to increase revenue at a faster rate than the growth of expenses. Thus, according to petitioners' exhibit, from 1940 to 1941 (year ended October 31) the revenues increased by 20.3 per cent and the expenses only 13.3 per cent. From 1939 to 1940 the revenues increased by 7.5 per cent and the expenses 5.9 per cent. An initially favorable response of net revenues to a growth in traffic may be modified by necessary rehabilitation expenses in later years.

The railroads criticized this protestant's exhibit in detail. The protestant then submitted supplemental estimates of net railway operating income, giving effect to the criticism, of $823,755,178 if revenue increased by 10 per cent, and $966,580,795 if increased 20 per cent, both without increases in rates or fares. The resulting net incomes were computed as $379,117,846 and $521,943,463, respectively.

The supplemental exhibit also estimates on the basis of the volume of traffic in 1941, the added revenue estimated by carriers to accrue from their proposal would raise the net railway operating income to $1,100,137,742. If a growth of traffic increased the revenues by 10 per cent, this result could be achieved, according to the exhibit, by a 5.7 per cent increase in freight rates generally (other than on coal, coke, and iron ore rates), and if revenues were increased by 20 per cent as a result of the increase in tonnage, an increase of 3.8 per cent would be needed. Both these estimated percentages were in addition to the requested increases on coal, coke, iron ore, passengers, and milk.

Proposed increase effect on rate of return.—The Louisville and Nashville Railroad Company submitted a partly estimated statement of financial results of operation for class I railroads of the southern region for 1941, after allowing for the higher wage basis, increased revenues from proposed increases in rates and fares, and an as-

sumed deficiency in depreciation charges. The rate of return was 4.37 percent on a rate-making value of $2,282,256,298 (adjusted, but not recommended by the witness), 3.85 percent on book investment, and 4.33 percent on book investment less accrued depreciation. The purpose was to show that the proposed increases in charges would not result in an unreasonably high return. Without the questionable deduction for alleged deficiency in depreciation charges, these tax-free rates of return would have been 6.08 percent, 4.36 percent, and 4.91 percent, respectively. These percentages are computed without any allowance for the effect of increased traffic in 1942; but, on the other hand, no adjustment was included for possible increases in prices of materials and supplies and for other increased cost of operations during the war period, in addition to the wage increase.

The State regulatory commissions of eight southern States in this connection directed attention to the increase in gross and net earnings of class I railroads in the southern region in the first 10 months of 1941 compared with the same period in 1940, with an alleged return of 7.05 percent on a certain rate-making value stated in their exhibit. There was objection to the use of this value.

American Short Line Railroad Association.—A statistical exhibit of this association gives condensed income accounts for railways other than class I for the years 1930 to 1940. For the line-haul class II carriers there was a deficit in net income for each year of this period, except 1936, 1937, 1939, and 1940; and for line-haul class III carriers there was a deficit in every year. More favorable results are shown for switching and terminal companies, for which a net income appears in every year, 1930-1940. On the other hand, for electric railways reporting to us a deficit is shown for every year except 1930.

Traffic Evidence.

General.—The petitioners are not attempting to obtain compensation for increased wages amounting to about $90,000,000 accrued in 1941, but they seek increases sufficient to cover additional costs accruing thereafter. As

the added expenditures described are incurred by both passenger and freight operations, the position taken is that increases should be borne by both kinds of traffic, and by every type of service save those excepted from the proposals. A virtually uniform percentage increase was favored by the railroads as the most practicable and quickest method of obtaining greater revenues. Because of the urgency confronting the petitioners, their traffic executives were of the opinion that they could not work out detailed increases in cents per 100 pounds for application on specific traffic, and that it was not practicable to attempt to obtain a substantial part of the needed revenue by advancing depressed or competitive reduced rates to the maximum reasonable bases heretofore prescribed by us, although competition with motor or water carriers might no longer be potent. Protracted negotiations with shippers and litigation were likely from any such attempts. Since previous general increases, the railroads have conducted analyses to discover where the rate structures now repel or impede traffic, and made corrections by raising or lowering the rates. It was represented that the carriers desire to keep rates as responsive to commercial necessities as conditions reasonably will justify.

The testimony of the traffic expert of the petitioners is that the increase sought, if 10 percent should be authorized, will produce substantial additional revenue, but not more than about 8 percent, judging from experience with previous general increases. This estimate contemplates that increases shall be made effective in intrastate fares and rates, corresponding with those proposed interstate, which will contribute a material but unknown proportion of the total increment to revenue.

The rail petitioners lay stress on the greatly improved economic condition of the country, and the probability that the need for transportation service will continue to grow for a long period and will be reflected in demand for services by railroad. Indicative of the extent to which the Government and shippers depend upon railroad service, in 1941 the petitioners transported about 470 billion ton-miles of revenue freight, which exceeded by 5.1 percent

the previous record made in 1929. The railroad petitioners represent that the present circumstances are such that the increases herein proposed will have no unfavorable effect upon the volume of traffic to be handled: some may be diverted, but not as great an amount as was lost after the general increases of four years ago under dissimilar conditions.

Because of war-time conditions, with diminished truck and water competition, coupled with greater demands for transportation, the railroads foresee no likelihood of competitive conditions compelling a reduction in rates. A large volume of transcontinental traffic has been, and is being diverted from the Panama Canal route to the railroads; but the railroads have made no estimate of the increased revenue which they will derive because of such lessened intercoastal competition.

No surplus of transportation exists. All railroad facilities are in use today or held in reserve ready for use. The railroads are endeavoring to enlarge their facilities and supply of locomotives and cars, in order to meet the swelling volume of traffic developing from the emergency. This program entails heavy expenditures. In order to function efficiently, and to meet the rising and new costs imposed upon them by war conditions, the railroads say that they should be permitted to earn revenues adequate for those purposes, so that they may continue to perform their share of the country's requirements in the present crisis. To this general statement little or no exception was taken by anyone during the course of the hearing. Compare section 15a (1) of the act and the National Transportation Policy.

As to the reasonableness of the rate basis, when the component rates are increased as proposed: in 1941 the effective rates produced 9.42 mills per average ton-mile of revenue freight. If that average yield were increased by 10 percent, or to 10.36 mills, it would be less than the average received by the railroad petitioners during the years 1929 to 1932, inclusive, when operating expenses and wage scales were much lower than at present.

The proposal of the class I railroads contemplates the application of the proposed increase to every published rate or factor, whether presently effective or temporarily

inoperative because held in abeyance by another rate bearing an expiration date or suspended for a period by order of the Commission, so that if and when such rates become effective they would include the general increase. By increasing every rate or factor the petitioners would avoid the difficulties of a published rule providing for the application of combination rates.

If the increase is granted, carriers will proceed immediately to restore established relations and differentials in rates. To this end they suggest that the Commission and railroads set up special committees. A special committee of traffic executives set up by the railroads to deal with interterritorial adjustments is referred to later in this report.

Agricultural products.—Petitioners, in support of their assertion that economic conditions of agriculture are now such that it can well bear the proposed increase in transportation rates on its products, cite the December 1941 issue of "The Agricultural Situation," a publication of the Bureau of Agricultural Economics, United States Department of Agriculture, in which the total cash farm income is estimated at 11.2 billion dollars for 1941, compared with 9.1 billions for 1940 and 8.7 billions for 1939. In the general increases of 1938, an increase of but 5 percent was authorized on agricultural products, while greater increases were permitted on practically all other traffic.

It is intended to renew as they expire the rates on farm commodities in the West at present on an emergency basis.

Coal and coke.—Petitioners' proposals for specific increases upon coal and coke are said to take into account a fair relation between the increase on these commodities and the percentage increase proposed on all others except iron ore. Coal and coke have become increasingly competitive with other fuels or forms of energy, and the railroads state that there is a limit beyond which they can not go in making increases at this time. The measure of present rates and competitive conditions are such that smaller increases are proposed to be applied on coal and coke than on other traffic, but the petitioners do not desire to place an undue burden on the latter.

Rates on coal and coke always have been treated separately from those on other commodities generally, and they are treated so in the present proposals for the purpose of preserving competitive relations between the producing groups, outstanding of which are the relations of many to the southern Illinois base group. Therefore, it is proposed to increase the rates by specific amounts per ton, except the following: On coke all west-bound transcontinental rates and rates from Utah to Pacific coast points the proposed increase is 10 percent, which would yield much more than the specific amounts of 10 cents or less per net ton proposed on coke in western territory. The justification for this exception is merely a statement that these coke rates are grossly inadequate. Only these coke rates, of all throughout the country, are singled out for exceptional treatment because supposedly inadequate in amount.

The greater increase proposed on coal and coke in western territory, including Illinois, than in eastern and southern territories is sought to be justified because the need of revenue is alleged to be greater in western territory, and because of the competitive situation which exists in eastern territory. Earnings in that part of the western district where coal tonnage is heaviest have been inadequate, in proof of which carriers say that receiverships and trusteeships are more numerous there than in other sections of the country.

Iron ore.—Somewhat similar conditions to those applicable to coal and coke have led the petitioners to ask approval of increases in specific amounts smaller than would be yielded by a 10-percent increase. While the earnings of one ore carrier must be high, petitioners contend that a rate increase is needed, because unless that carrier obtains the increase the other ore-carrying lines in the same territory can not get it although they may need it to meet the wage increases.

Accessorial charges on freight.—As set forth in appendix 1, no increase is proposed on certain charges of this character. Petitioners can not estimate the revenue they would derive from the increase on the charges affected.

Iron-ore tonnage has fluctuated widely—almost wildly—from year to year, because of which fact the ore-carrying

petitioners urge that a higher rate of return is justified for them than for railroads engaged in the handling of general and more stable traffic. They assert that in depression years their earnings fall off sharply, leaving them in poor financial condition.

Passenger Fares and Passenger-Train Services

As stated, no increase is sought in the fares for members of the armed forces traveling on furlough, or in the extra fares applicable on particular trains. The latter fares are excepted for the reason that the services for which they are charged are not directly affected by the recent wage increases. No authority is sought to make effective any increases in the charges for accessorial or allied passenger-train services, such as handling baggage or excess baggage, switching loaded or empty passenger or baggage cars, moving special trains, parking passenger or baggage-car equipment, transporting passenger automobiles, motion picture films, newspapers and periodicals, invalid chairs, and burial cases; and transferring passengers between stations in the same city.

The history of the passenger fares, traffic, and revenues of the railroads in the last several decades may be found in *Passenger Fares and Surcharges*, 214 I. C. C. 174, and *Eastern Passenger Fares in Coaches*, 237 I. C. C. 271, and will not be restated. The basic fares generally in effect throughout the country when the petition was filed were: In sleeping and parlor cars, one way, 3 cents per mile; round trip, in the East, except locally in New England, a descending scale from 3 cents per mile for the shorter hauls to 90 percent of 3 cents at 900 miles; in the South, 30-day tickets 2.25 cents, 6-month tickets 2.5 cents; in the West, 60-day tickets 2.25 cents, 6-month tickets 2.75 cents; in coaches, one way, 2 cents per mile in the East and West, and 1.5 cents in the South; round trip, in the East, except locally in New England, a descending scale from 2 cents for the shorter hauls to 1.5 cents at 533 miles, 1.8 cents in the West, and 1.35 cents in the South.

The average revenue per passenger-mile on the class I railroads for 1940 was 2.3 cents in sleeping and parlor cars

and 1.51 cents in coaches. On all passenger traffic in the year ended September 30, 1941, the average was 1.754 cents, the lowest rate per mile in railroad history. The average increase per mile proposed is thus not more than 2.3 mills in sleeping and parlor cars, 1.51 mills in coaches, and 1.754 mills on all passenger traffic. In the year ended September 30, 1941, the total passenger revenue was $483,568,775, which was 33.6 percent less than in 1930, but the number of passenger-miles was 2.82 percent greater and the average-mile revenue 35.4 percent less than in 1930.

Petitioners express confidence that the increase proposed will not curtail the travel volume, which they estimate will not be less in 1942 than it was in 1941. Business and economic conditions are more favorable for rail travel than in 1936 when the present maximum basis of 3 cents in sleeping and parlor cars and 2 cents in coaches was prescribed by us. An important contributing factor is the recent curtailment of automobile production and a scarcity of rubber tires for automobiles.

The only protestants against the proposed fare increase are a representative of the State of South Dakota, and an individual who is a frequent passenger, who appeared in his own behalf. The former based his opposition upon the belief that increased fares would discourage travel by rail and would not result in increased revenue to the carriers. The latter, for many years a student of transportation economics, presented data to show that since 1920, when the last general increase in passenger fares throughout the country became effective, increased fares usually resulted in reduced revenues, and reduced fares in increased revenues. He is convinced that the increase now sought will have the same effect.

Because of the abnormal conditions which now prevail throughout the country we are of the opinion that the increased fares proposed will yield substantial amounts of additional revenues, and that the passenger service justly and reasonably should contribute to meeting the added operating costs of the railroads.

In an appropriate order made in this proceeding on January 21, 1942, we found that the increase in fares proposed is necessary to enable the petitioners to continue to render

adequate and efficient railway transportation service during the present emergency, and that the proposed increased fares will be reasonable and lawful. We therein approved the proposed increased fares subject to a suitable rule for the disposition of fractions stated in the order.[3]

All our outstanding orders, as amended, authorizing or prescribing interstate and intrastate fares, or bases of fares, were modified by that order, effective concurrently with the establishment of the increased fares therein approved, to the extent necessary to permit the authorized increase to be added to the interstate and intrastate fares approved or prescribed in, or maintained or held by virtue of, such outstanding orders. We retained jurisdiction for the purpose of determining, if need be, the lawfulness of any particular fare or fares resulting from that order. Increased fares were filed and became effective February 10, 1942.

The foregoing findings as made in our order of January 21, 1942, are here renewed and affirmed.

As pointed out, the petitions of the carriers do not seek to increase the charges for accessorial or allied passenger-train services, certain of which we have named above. Accordingly, the authority granted in our order of January 21, 1942, above referred to, including permission therein to publish and file the increased fares on 10 days' notice, made no reference to charges for such services. Nevertheless, many of the tariffs filed under the purported authority of that order also included increased charges for the accessorial or allied services in addition to increased passenger fares. We have suspended the effective date and entered an order of investigation as to such increased charges. The matter is now pending.

An increase of 10 percent is proposed in the rates and charges on milk and cream, and articles grouped therewith,

[3] The rule of fractions provided that when the total increased fares are less than $1, fractions of less than 0.5 cent shall be dropped and fractions of 0.5 cent or greater may be increased to the next whole cent, and that when the total increased fares are more than $1, such fares shall end in 0 or 5, but that no more than 2.5 cents shall be added to the present fares as increased by 10 percent in order to make such total fares end in 0 or 5.

as published in passenger tariffs. Usually these commodities are carried on passenger trains. This rate proposal will be considered later herein. No specific evidence in support of the proposal as to milk and cream was offered by petitioners.

* * * * * * *

1941, were generally priced to give much higher yields. The yields were from 5 to over 10 percent for a group of roads (not under reorganization) operating more than 41 percent of the total mileage of class I railroads.

Interests Supporting Petitioners

Numerous producers, manufacturers, and representatives of industrial and commercial organizations throughout the country presented testimony and endorsed in principle the claim of the rail carriers as to the urgent necessity for increased revenue. The position of the National Industrial Traffic League is typical of others who support the propositions that it is vitally essential and in the public interest that the transportation system shall be maintained at its maximum operating efficiency during the war emergency; that increased rates be permitted to become effective promptly; and that special treatment is justified in the light of transportation and economic conditions as between rates on certain commodities, either in the method of applying the increase, or even to the extent of exempting commodities from any increase.

Position of Governmental Bodies

Office of Price Administration.—This agency takes no position with respect to the general increase sought. It was declared that the particular problems with which this agency is most concerned herein are those which may result from rates on individual commodities, which were not named, rather than from a general increase.

Following discussion with the Office of Price Administration and others the class I applicants undertook to set up a committee composed of traffic executives, for the

purpose of considering and passing upon requests by shippers, and by state and federal governmental bodies, for readjustments and corrections necessitated by present or changed conditions. We are assured that the action of this committee will be prompt, and will be along lines intended to facilitate the even flow of commerce and preserve the industries of each section in fair competition, as far as may be possible consistent with the spirit of our findings. It is fair to say that upon this record many of the protestants have stated that they are skeptical of the results of the formation of this committee. Nevertheless, the utility of such a committee to which those interested may have opportunity to resort informally is clear, if the functioning of the committee shall be prompt and along broad lines.

Bituminous Coal Consumers' Counsel.—The representative of this agency authorized by statute to appear on behalf of consumers of coal, disclaimed intention to take any general position for or against the proposed increases as a whole. He expressed general approval of several of the proposals and called attention to some matters of public interest particularly affecting the coal rates.

He asserted that for the first time in the last ten years the revenues of the railroads have reached a point where the question of a fair return on investment is in issue. Reference is made to a return of 5.75 per cent found in *Reduced Rates, 1922, supra*, to be a fair return, and to our statement in the report therein as to Federal income taxes previously quoted in this report. The proposal of generally lower increases on coal than other commodities was approved, and it was declared that coal has carried a large part of the transportation burden through the depression years and should not be required to bear the same amount of increase as other commodities. Various suggestions were made by the Consumers' Counsel as to details of the proposals, which have received our consideration.

The position taken by the Secretary of Agriculture and by regulatory commissions and other officers and agencies of various states will be stated later.

Protests Against Petitioners' Proposals

General.—A large part of the testimony adduced by the protestants was directed to the question which has been encountered in virtually every preceding general increased-rate case, whether the additional revenue sought shall be obtained by the imposition of a percentage or varying percentages upon traffic generally, or shall be derived by means of the addition of "flat" or certain amounts to the going rates. Subsidiary to this latter proposition is the suggestion often made that if a percentage increase is applied there shall be specified maximum amounts of increase as to particular commodities.

As may be gathered from our past reports where we considered similar contentions, the controversy is really between the shippers who are located at considerable distances from their markets and those who have markets relatively close. Distance alone generally imposes a handicap on the long-haul shipper, since the rate he pays exceeds that paid by his short-haul competitor. The long-haul shipper looks at the difference in the two rates, and sees in a prospective increase of each rate by means of a uniform percentage a widening of this rate difference in cents per unit of transportation. This he regards as an important factor in his competition with the short-haul producer, and he naturally opposes the use of the uniform percentage method of increasing rates, or seeks a maximum limit upon the amount of the increase. The short-haul shipper, on his part, regards his shorter distance as an advantage to which he is entitled, and urges with force the principle that the adjustment of rates with reference to cost of service requires increased expenditures, such as those which form the basis for this case, to be distributed ratably among the rates so as to represent contributions for services performed.

In preceding general rate increases, and that made by the Director General of Railroads, sometimes one method and sometimes the other, or a combination of both, has been used. We have never attempted to lay down a rule applicable at all times and upon all commodities, but our decisions have been adjusted to meet the needs of commerce

and industry and to preserve the rights of the parties as we saw them in particular proceedings.

It will not be necessary in the statement of the testimony produced in opposition to the proposals to reiterate these conflicting positions. In general we observe here, as in previous cases, that the positions of the various protestants conform to the patterns above indicated, according to their respective interests.

Products of Agriculture

General.—The position of the Secretary of Agriculture is that a general increase in freight rates and charges should be allowed, but that an increase of 10 percent is unnecessarily large, and that agricultural commodities, including livestock, products thereof, and canned foods, either should be subjected to no increase, or at least that such increases should be less than authorized on other traffic. He points out that petitioners' estimated increased annual cost of approximately $361,000,000 is 6.8 percent of the total net operating revenues in 1941, amounting to approximately $5,300,000,000, which percentage is termed the maximum that should be considered. Even an increase of 6.8 percent, he claims, would be excessive, because of the expected growth in traffic during 1942 and 1943.

Those dependent on rail transportation emphasize their inability to pass on increased transportation charges, and their financial inability to absorb them. The brick and tile industry was adversely affected by the depression in the construction industry. However, conditions in the industry have improved since 1933. In general, while opposing a 10 percent increase, they suggest a graded method of increase be applied if any be approved.

Two brick manufacturers in Iowa do not oppose an increase provided it is by percentage and is less than permitted on general traffic.

Conclusions and Findings.

The general character of the evidence produced by the respective parties and their claims and contentions, based

upon their evidence, have been recited. The weight to be accorded the evidence must be measured to some extent by its self-serving nature, and by its necessarily generalized character, for it was given under circumstances which precluded searching cross-examination or effective rebuttal. The greater part of this testimony was unchallenged and is unrefuted, except as it may be contradicted by the mass of the testimony introduced. Our decision in this proceeding cannot be based on the granting of individual, sectional, or particular industrial desires or needs. There will be some element of hardship and sacrifice whatever we do, or if we do nothing.

The present proceeding is not the first in which we have been asked to pass upon a general rate increase. During World War I and the ensuing 5-year period there were three such increases of rates and one decrease. In the *Fifteen Per Cent Case*, decided in 1917, 45 I. C. C. 303, eastern carriers were allowed to increase class rates and rates on iron ore 15 percent and in that and related proceedings early in 1918 specific increases on certain commodities were authorized in the southern and western districts, as well as in the eastern district. Again, by General Order No. 28 the Director General of Railroads in 1918 increased freight charges as a whole on a basis intended to yield approximately 25 percent increase in revenue. Commutation passenger fares were increased 10 percent and regular passenger fares were increased to 3 cents a mile with a 16⅔ percent surcharge for travel in sleeping, parlor, and private cars. The surcharge was removed before the end of Federal control. In the general increase of 1920 we authorized increases in freight rates of 40 percent on the eastern railroads, 25 percent on the southern and Mountain-Pacific roads, 35 percent on other western roads, and 33⅓ percent interterritorially. Passenger fares were raised 20 percent, plus a 50 percent surcharge for travel in Pullman cars to accrue to the railroads. A reduction of approximately 10 percent in freight rates generally was ordered in 1922.

In the remainder of the decade 1920-1939 the level of rates and fares was not disturbed by cases of nationwide application. Thereafter, following the inception of the de-

pression we re-examined the general level of these charges in *Fifteen Per Cent Case, 1931*, 178 I. C. C. 539, and again in Ex Parte No. 115, supra. In both proceedings small temporary general increases in freight were allowed. Passenger fares were revised downward in 1936. *Passenger Fares and Surcharges, supra.* In 1937 and 1938, in Ex Parte Nos. 115 and 123, general increases in freight rates of from 5 to 10 percent were permitted. Since 1930 there have been many individual adjustments of rates, mostly reductions made voluntarily by railroad carriers to meet actual or threatened competition from other agencies of transport, which resulted in an appreciable lowering of the general rate level.

A nation wide increase, chiefly on a percentage basis, is now proposed. Some important rates average somewhat higher than those effective in 1929, while others are generally lower. Obviously, there can be no detailed ironing out of inequalities in this proceeding.

Not only since this country entered the war, but for some time before by reason of enormous expenditures for national defense preparations, industry generally has felt the impetus of these events directly or indirectly by markedly improved business.

The annual cost of the wage increase late in 1941 was estimated to be $331,771,000 for class I railroad carriers on the basis of the employment of the calendar year 1941. The details of the estimate are given on an earlier page. Of this amount not over $300,000,000 is chargeable to operating expenses as distinguished from tax accruals and capital account. The corresponding totals for 1942 will be greater to the extent of the added number of employes and increase in overtime. There has also been a rise in the cost of materials used by the railways. Notwithstanding the fact that the higher level of operating costs was in large part retroactively effective beginning September 1, 1941, and fully effective on December 1, 1941, the net railway operating income of that year, after deduction from revenues of all expenses, operating rents, and taxes, including payroll and income taxes, was $999,500,000. After the deduction of all accrued fixed and contingent charges the net income available for sinking funds, reserve funds, dividends, and im-

provements was approximately $500,000,000. If pending reorganizations were completed and interest accruals reduced accordingly, this amount would be even larger. This can not, however, be considered too high for a prosperous year following a long period of lean years. Had the higher cost level been in effect throughout the year 1941, the net railway operating income would have been more than $200,000,000 below the $999,500,000.

For 1942 the prospects are for higher railway gross revenues than were reported for 1941. We have approved a 10 percent increase in passenger fares, which became effective on February 10, 1942. This was estimated by petitioners to yield $45,000,000 with the traffic volume of 1941, but in view of the substantial increase in passenger traffic that has already occurred this may turn out to be a considerable underestimate. There is also a prospect of further increase in the volume of freight movement and in the freight revenue in 1942. Such an increase has occurred, and seemingly the trend is still upward. For December 1941, the freight carloadings were 12.1 percent greater than for December 1940 and the freight revenue increased 26.2 percent. The difference in these two percentages is accounted for by the increased proportion of the freight yielding a high revenue per carload. For the first seven weeks of the year 1942 the number of carloadings was 11.7 percent greater than for the like 1941 period. The freight revenue for January 1942 exceeded the January 1941 total by about 26 percent. But whatever the growth in revenue may be, a considerable part of it should be carried into the net earnings. It is clear that the need for increased earnings which the petitioners predicated upon the traffic volume of 1941 is subject to some discount on account of the prospect for a further growth in traffic and the consequent greater net earnings in 1942.

Income tax rates are likely to be higher for 1942 than for 1941, but the effect thereof on net railway operating income could be only a matter of conjecture.

It has been suggested by some of the protestants that a considerable part of these increased expenses, and par-

ticularly the expenses immediately due to war conditions, could be recouped to the rail carriers by a waiver of the "land-grant" rate privilege, whereby military and naval property of the United States and the members of the armed forces traveling on duty are accorded rates (borne by the government) of approximately one half of the going reasonable transportation rates. These "land-grant" rates apply only upon certain roads and portions thereof, but are competitively extended to others. They are now applied to a large and even an increasing proportion of all the shipments made by the Government.

The waiver of the land-grant privilege can come only from Congress. By the Transportation Act of 1940, Congress evinced an intent to restrict this privilege, but it left the law in the condition as to which now both shippers and railroads complain. We have long felt the imposition of land-grant deductions was unfair, and that the main objective of the original grants long ago had been met so thoroughly that now it is equitable that the Government should pay the same reasonable rates for its transportation that its citizens do. But until Congress acts favorably no part of the increased costs can be recouped by the suggested method. In fact, it seems likely that the land-grant deductions will continue and will even increase in the aggregate in the immediate future, unless certain pending legislative proposals for repeal are given favorable consideration by Congress, through an expidited parliamentary process.

Representations were made by some protestants that any increases authorized in this proceeding should be made by the addition of specific amounts rather than by percentage. With the exception of certain important commodities hereinafter mentioned, the nature of the emergency situation and the character of information before us do not permit resort to the suggested method of effectuating an increase in the general rate level.

A rate increase of 10 percent applied to the present increased traffic and that which is reasonably in prospect would yield a larger amount than is necessary to meet the avowed purposes of the increase sought. But a smaller increase is justified.

We have already permitted an increase in the passenger fares, as recited. It is just and reasonable in order that the railways may continue to give the efficient service which is indispensable to our national defense that the body of freight rates and charges, except those hereinafter specifically excepted, shall be increased. We must give weight, in effecting such increase, to the conditions which prevail in the several industries of the country, to the rates upon the commodities these industries produce or manufacture, and to the transportation revenues they yield.

It would be desirable, if feasible, to consider the needs of the railways individually, and to adjust their respective schedules to meet their several needs. The exigencies of the case do not permit such refinement. Further, the weak and strong lines are interlaced and in keen competition, and necessarily the rate structure must be uniform, otherwise the strong road with a lower rate system will attract the competitive traffic and exterminate the weaker line. However, as to certain important commodities it happens that the rate structure is such that the relative strength or weakness of the most important rail carriers involved can be reflected in the rates on the commodities involved. Where the evidence justifies such action, they can receive special treatment, and thereby mitigate the disturbances and inequalities which would follow the imposition of a uniform percentage increase.

The consumers of food will be better off if food be cheap. Thus they may conserve income for war purposes and at the same time increase individual consumption. That they bear a considerable part of the total cost of transportation and distribution seems implicit in recent increases in the retail or final consumer's costs of food products. Advances in the prices of food stuffs, as a major element in the cost of living afford a predicate for renewed demands for higher wages in transportation and other industries. It is in the interest of the carriers and of the public generally that the cost of food shall not be permitted to advance any more than is absolutely unavoidable.

The situation as to relative strength of the Granger roads, and those properly treated as principally agricul-

tural rail lines, is the reverse from that of the principal bituminous coal and iron ore carrying lines in general. The former are relatively weak, and their present revenues have no such cushion as the latter against the wage and other increases here considered. Relatively the agricultural lines do not transport as much high-grade, manufactured traffic as the other roads, not primarily coal carriers. If they are to receive any substantial amount of added income from a general rate increase, the amount which would be allocated to other traffic would be unduly high unless agriculture bears a part of the burden. The increased costs which form the basis of the petition herein are incurred as much for the movement of agricultural commodities as for any other traffic.

Considering the factors involved, it seems just and reasonable to permit the going rates on agricultural products and livestock to be increased by a lesser percentage than non-basic commodities generally. To avoid disruption of the relation between live and dressed animals, and because the products are necessary foodstuffs, certain products of animals hereinafter specified will be treated in the same manner as livestock.

There are also certain other commodities moving in volume, which are generally and properly recognized as basic. These commodities, such as sand, gravel, slag, and low grades of stone, should reasonably bear their share of the increased costs, but not the maximum percentage found to be justified as to the higher grades of traffic.

The remaining articles and descriptions of commodities we see no reason for excepting from general treatment.

We therefore conclude and find that the proposals before us have not been justified as a whole, but that the resulting rates, fares, and charges will be just and reasonable if passenger fares are increased to the extent already permitted by our order, and if freight rates and charges are increased to the extent indicated below and as more particularly specified in Appendix 2.

Upon iron ore and iron sinter, we find that no increase has been justified.

Upon other commodities generally, except such as are described later herein, and upon accessorial charges as specified in Appendix 2, we approve an increase in the present rates and charges of 6 percent.

Upon anthracite, bituminous coal, coke, and lignite, we find that rates stated in amounts per net ton may justly and reasonably be increased 3 cents when the present rate is $1.00 or less and 5 cents when the present rate exceeds $1.00; and that rates stated in amounts per gross ton may be increased 4 cents when the present rate is $1.00 or less per ton, and 6 cents when the present rate exceeds $1.00 per ton, subject to the provisions of Appendix 2.

Upon the basic or raw products of agriculture, animals and products, and products of mines, specified in Appendix 2 hereto, we approve an increase in the present rates and charges of 3 percent.

The application of the percentage increases herein authorized shall be subject to the rule for disposition of fractions set out in Appendix 2.

The increases authorized are upon the presently going rates, speaking as of the date of this report, and rates published and filed but not yet effective, but not upon rates held in abeyance by tariffs naming reduced rates with a future expiration date to be revived upon the expiration by limitation of time of the now effective reduced rates. Such authorized increased rates and charges may become effective not later than May 15, 1942, upon 10 days' notice, as provided by the act.

The various interveners will be authorized to make the same increases as the class I railroads, which we have principally discussed. If this authorization does not dispose of the issues raised by their petitions, the matter may be called to our attention, provided any disputed matters prove to be incapable of adjustment informally.

The increases herein authorized grow out of the emergency caused by the war, and our authorization will be limited to that emergency. Unless sooner modified or terminated in further proceedings herein, or in other proceedings such as the act contemplates may be maintained.

this authorization shall expire six months after the termination of the present war.

The record will be held open for the purpose of giving consideration to any necessary readjustments or corrections which the circumstances may warrant, if brought to attention in the manner prescribed in our rules of practice. The Commission will give any possible aid to the informal adjustment of any matters arising hereunder, if its aid is deemed helpful.

Rates and charges increased as herein permitted are not prescribed rates and charges within the meaning of *Arizona Grocery Co.* v. *Atchison, T. & S. F. Ry. Co.*, 284 U. S. 370.

Appropriate orders for relief under sections 4, 6, 217, and 306 of the act will be entered, so as to effectuate in a simple manner the carrying into effect of our authorization and findings; our outstanding orders will be modified accordingly; and the proceeding is continued on our docket.

Chairman Eastman did not participate in the consideration or disposition of this proceeding.

ATTCHISON, *Commissioner*, concurring:

I concur in the foregoing. However, I regard scrap iron and steel and pig iron as similar to iron ore, and of such importance in the national economy at the present time that no increase should be made thereon. With respect to the lower grades of lumber, its products, and similar articles in the lumber list, such as logs, poles, and piling, for the same reasons which lead to the imposition of a lower rate of increase on basic commodities such as sand, gravel, and broken rock, I favor imposing no higher increase on these forest products than on the products of mines named. Further, to mitigate somewhat the effects of a uniform percentage increase applied regardless of distance, I would limit the amount of the increase upon the commodities taking a 3 percent increase, and also the forest products herein mentioned, to a maximum of 3 cents per 100 pounds.

Commissioner Alldredge authorized me to state that he concurs in the foregoing expression.

MAHAFFIE, *Commissioner*, concurring:

To the extent this report results in increases I approve it. I regret that a majority of the Commission could not see its way clear to permit larger increases. Making the increases temporary I think a mistake. Wages are not on a temporary basis.

The railroads seek permission to try to recoup from rates and charges approximately the amount of the increased wages they are required to pay. They are also confronted with mounting costs of materials and supplies. The report allows increases that can reasonably be expected to meet only a part of the rise in wages. Nothing is provided for the other inevitable increases in expense. Transportation by railroad is a vital factor in our war effort. To maintain it so that it may function effectively requires adequate revenues. Its failure might well be disastrous. New transportation facilities must be provided as war needs indicate. To a large extent, the country is relying on the railroads to provide them. The civilian population is increasingly dependent on common carrier transportation to meet its requirements both for passenger and freight service. It will suffer vastly more from any failure

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APPENDIX D.

Interstate Commerce Act.

National Transportation Policy.

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act (chapters 1, 8, and 12 of this title), so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust dis-

criminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions; —all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act (chapters 1, 8, and 12 of this title) shall be administered and enforced with a view to carrying out the above declaration of policy.

Section 15a (2)

In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

No. 178

ILLINOIS COMMERCE COMMISSION, JOHN D. BIGGS, WILLIAM PARRILLO, et al.,

Appellants,

vs.

CHARLES M. THOMSON, AS TRUSTEE OF THE PROPERTY OF CHICAGO AND NORTH WESTERN RAILWAY COMPANY,

Appellee.

Appeal from the District Court of The United States for The Northern District of Illinois.

APPELLEE'S BRIEF.

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Appellee.

Appeal from the District Court of The United States for The Northern District of Illinois.

APPELLEE'S BRIEF.

JURISDICTION OF THIS COURT.

Prior to this Court's ruling on appellants' jurisdictional statement, appellee filed his statement in reply thereto and included therein his motion in the alternative to dismiss or affirm.

The ground of opposition was that the questions raised by appellants were so unsubstantial as to require no further argument. Except for that it was, and is, conceded

that this Court is authorized to and should take jurisdiction of the appeal under the applicable statute (28 U.S.C. 380). Appellee's motions are now renewed.

STATEMENT OF THE CASE.

As appellants' statement does not contain all that is material to a determination of the questions presented and is in some respects inaccurate this further statement becomes necessary.

Submission and Decision in the District Court.

The appellants filed no answer below and elected to stand upon their motion to strike the complaint and dismiss the cause, thereby admitting all facts set out in the complaint and Exhibits A, B, and C thereto attached (R. 1-37, 50).

On the final hearing the Court had before it the sworn complaint, and the supporting evidence received at the preliminary hearing, which included the full texts of the reports and orders of the Interstate Commerce Commission pleaded in the complaint. The Court also had before it in the briefs (1) an order of the Interstate Commerce Commission in its Docket No. 11860, a proceeding entitled "Montana Rates and Fares" entered March 24, 1942, a copy of which is attached hereto as Appendix A, and (2) the opinion of a New York Supreme Court judge in *Transit Commission* v. *Long Island R. Co.*, 33 N.Y.S. (2) 993, a copy of which is attached to appellants' brief on this appeal as Appendix A (R. 50).

The findings and conclusions made by the District Court are full and complete (R. 50-56). They set forth the controlling facts established by the complaint and submission of appellee and sustain appellee's complaint and position throughout.

Quite contrary to the statement in appellants' brief (p. 5) that appellee relies *alone* upon the Ex Parte 148 order, the Court found the appellee's right to charge the increased fares had its inception in a previous order of the Commission entered in 1925, in Docket No. 11703 (complaint VII-IX and Ex. A; R. 6-10, 19-31), by which the Chicago and North Western Railway Company was "notified and required * * * to establish, put in force and maintain" the fares charged by appellee prior to March 8, 1942 (R. 31). Having specifically retained and exerted a continuing jurisdiction over those prior existing fares, the Commission in its 1942 order, in Ex Parte 148, by specific reference to Docket No. 11703, *modified* its 1925 order so as to authorize and permit the filing of tariffs increasing the fares ten per cent (Ex. B, R. 32-4). The *continuity* of the Commission's *control* of these fares and *modifying character* of the 1942 order were both pleaded by appellee (R. 7-10) and found by the court (R. 51-3). The court concluded and held (findings 2 and 3, R. 55):

> "The said order of January 21, 1942 expressly modified the previous order of the Interstate Commerce Commission entered in 1925 (Exhibit A attached to the complaint herein), by which the Interstate Commerce Commission had taken jurisdiction over the passenger fares involved in this suit, which jurisdiction it had thereafter retained. By virtue of its orders referred to in the foregoing findings, the Interstate Commerce Commission asserted and exercised its paramount and exclusive authority in the regulation of the passenger fares here involved, leaving the Illinois Commerce Commission without power to act with respect thereto.
>
> "The passenger fares established by the said tariffs which became effective March 8, 1942, are the lawful existing passenger fares which plaintiff is entitled to collect and retain."

After the District Court granted the interlocutory injunction herein and some weeks prior to the final hearing, the Commission entered its order of March 24, 1942 in Docket No. 11860, Montana Rates and Fares (Appendix A hereto). Without objection, the Court took judicial notice of that order and it was before the Court in appellee's brief at the hearing (R. 50).[1] That order was entered by the Commission for the sole purpose of reinstating its 1921 section 13 order establishing intrastate passenger fares in Montana in order that the 1921 order would be restored to the status of an "outstanding" order and thereupon be "modified" by the Ex Parte 148 order so as to permit and authorize the ten per cent increase in the Montana intrastate fares, in exactly the same manner that the District Court here has held appellee's 1925 order was modified. While none of the parties here were parties in the Montana proceeding, this last order therein is relevant and important because it fully confirms the character, purpose and effect of the Ex Parte 148 order. This confirmation, coming as it does from the Commission itself is pertinent and authoritative. It was entered subsequent to the New York Supreme Court decision above mentioned. It may well be held sufficient to relieve this Court from any necessity to consider appellant's argument based upon the New York decision (Appellants' point II, Br. 29-34). The Montana order is not mentioned in appellants' brief, however, and their argument proceeds as though it had not been entered.

The Court further found that the purport and effect of the so-called suspension order of the appellant Commission (Complaint, Ex. C; R. 35-7) was to prescribe intrastate passenger fares to be charged by the appellee from and

[1] In such circumstances the federal courts take judicial notice of Interstate Commerce Commission reports, orders and publications. *Terminal R. Ass'n of St. Louis* v. *Kimbrel*, 105 F. (2d) 262, 263; *Denver Union Stock Yard Co.* v. *U. S.* 21 F. Supp. 83, 87; *N. J. & N. Y. R. Co.* v. *United States*, 80 Ct. Cl. 243; *Morgan's La. & T. R. & S. S. Co.* v. *Isaac Jordan Iron Co.*, 243 F. 149, 151-3.

after February 18, 1942 at the pre-existing level and to prohibit appellee from increasing or modifying the same until further order of the appellant Commission at some indefinite time in the future; that the fares so purported to be fixed and prescribed by the appellant Commission were noncompensatory in that they would not produce sufficient revenue for appellee to meet appellee's expenses of rendering the transportation service involved; that said services were then being rendered by appellee at a loss and without deriving any return whatsoever upon the value of the property used therein; and that the increased fares then being collected pursuant to the authority of the Ex Parte 148 order and under the protection of the interlocutory injunction were still insufficient to meet the cost of the service which was still being rendered at a loss and without any return upon the property investment at the time of the final hearing (R. 53-4). These findings were in accord with the allegations of the complaint, admitted by the appellants' motion (Complaint XIV, R. 14-15), from which it also appeared that the increase in fares involved in this suit aggregates well in excess of $60,000 per year (Complaint XVI; R. 16). The Court concluded that enforcement of the rates prescribed by the appellant Commissions's so-called suspension order would be noncompensatory and confiscatory and the enforcement of the order would deprive appellee of his property without due process of law in violation of Amendment XIV (R. 56). Appellants' statement of the case omits any reference to these findings and conclusions and seeks avoidance of any discussion of this independent and separate ground of the District Court's decision by an assertion that the complaint "is not conceived in form or substance upon the theory that it asserts a right to have the propriety of the schedule of increased rates determined by a court inde-

pendently of and without regard to the order of the Commission" (Appellants' Brief, 5).

Appellee's complaint set up this independent ground of relief and the Court sustained it in addition to sustaining the validity of the increased rates established by the tariffs filed under the authority and direction of the Ex Parte 148 order. Appellee submits the decision below is well supported on both grounds and that upon either ground the judgment below should be affirmed.

ARGUMENT.

I.

Appellee's Authority to Charge the Increased Passenger Fares Derives from a Connected Series of Interstate Commerce Commission Orders by Which That Commission Exercised Its Paramount and Exclusive Jurisdiction Over the Intrastate Rates Here Involved.

The Interstate Commerce Commission first exerted its power and authority over these Illinois intrastate suburban passenger fares of the appellee in a proceeding entitled "In the Matter of Intrastate Fares Within the State of Illinois, Docket No. 11703," in which the 1925 report and order (102 I.C.C. 479, Exhibit A attached to the complaint; R. 19-34) were entered. That 1925 order was a supplemental order dealing only with these passenger fares of Chicago and North Western Railway Company, whose property and affairs are now possessed and operated by appellee as trustee. The report refers to the original order in that proceeding, reported at 59 I.C.C. 350 (R. 20). As shown at page 352, the original proceeding was conducted and these orders entered pursuant to paragraphs (3) and (4) of section 13 of the Interstate Commerce Act (49 U. S. Code, Sec. 13(3)-(4); Appendix B, hereto). The original report discusses and points out the paramount power which Congress had conferred upon the Commission by these paragraphs with respect to intrastate rates where discrimination against interstate commerce exists. Contrary contentions of the Illinois state officials were shown to be unsound (59 I.C.C. at pages 359-363).

It further appears from the complaint and findings herein that the supplemental report and order, Exhibit A, like the original report and order, followed a nation-

wide investigation of freight and passenger rates and charges throughout the United States after the close of the First World War, as a result of which a 20% increase was permitted.[2] That proceeding was the first general rate case before the Commission following the World War. It was a so-called "general-revenue" case, in that it was an application by the railroads as a whole for a general rate increase necessary to meet increased costs.[3]

The 1925 order authorized a 20% increase in these intrastate commutation fares of the appellee in order to bring the level of such rates up to that of the interstate commutation rates which had previously been increased 20% as above noted. This authority was exerted under section 13 for the expressed purpose of thus eliminating the undue prejudice, preference and advantage in favor of intrastate commerce and the unjust discrimination against interstate commerce which the Commission found to exist by virtue of the 20% differential between the two classes of fares where the two classes of commerce were being served under substantially the same circumstances and conditions. That is to say, interstate and intrastate passengers traveled in the same cars, sometimes riding in the same seats, and received in all respects substantially the same service, for which the former paid 20% more than the latter[4] (R. 19, 21-2, 29-30).

[2] That proceeding was entitled "Ex Parte No. 74, *Increased Rates, 1920*". (58 I.C.C. 220 and reference thereto at 59 I.C.C. 354.)

[3] "In the administration of the interstate commerce act a definite class of cases has come to be recognized where the paramount question is the general level of rates throughout the country or in territorial parts thereof, i.e., whether the aggregate revenues of the carriers shall be increased or reduced by a change in this general level. These are known as general-revenue cases." *Increases in Intrastate Freight Rates*, 186 I.C.C. 615, 620.

[4] A like order, involving passenger fares in the adjoining State of Wisconsin, was sustained by a special district court of three judges in a proceeding identical with this case. This court affirmed. *Wisconsin R. R. Com. v. C. B. & Q. R. R.* 257 U. S. 563, 565-7.

Following the 1925 order, the Chicago and North Western Railway Company secured an interlocutory injunction restraining the Illinois Commission and other officials from interfering with its establishment and collection of the fares as then increased. The case was never carried further and the injunction still stands (R. 6, 51).

The 1925 order was of a continuing nature and contained an express provision that it should remain in force until further order of the Interstate Commerce Commission. This is specifically pleaded in the complaint, admitted by the appellants' motion, and set forth in the Court's findings here (R. 7, 51).

In 1936 a further general and nationwide investigation of railroad passenger fares took place. This proceeding was known as Docket No. 26550, Passenger Fares and Surcharges (214 I.C.C. 174). While the order in that proceeding resulted in no change in appellee's Illinois intrastate fares, nor in any Illinois commutation fares, either interstate or intrastate, the order contained, nevertheless, a specific reference to the 1925 order and Docket No. 11703 (Exhibit A) and the Commission thereby retained its continuing jurisdiction over appellee's Illinois intrastate commutation passenger fares. This is also pleaded, admitted and found (R. 7-8, 51).

Finally, in the most recent general-revenue case, the Interstate Commerce Commission again exercised its continuing power and jurisdiction over appellee's intrastate commutation passenger fares in Illinois. In that proceeding, Ex Parte 148, the Commission entered its order, with appropriate findings, authorizing a general 10% increase in passenger fares on January 21, 1942. The order is attached to the complaint herein as Exhibit B (R. 32-5). By reference to the 1936 proceeding, Docket No. 26550, the Commission made this 10% increase in passenger fares

specifically applicable to the fares which appellee had established pursuant to the 1925 order in Docket No. 11703, by expressly modifying that and other outstanding section 13 orders (R. 33, 53, 55).

This order of January 21, 1942, covered passenger fares only. On March 2, 1942, the Commission entered a further order granting authority for a general increase of freight rates, and issued its report with findings supporting both the passenger fare and freight rate increase. That report (248 I.C.C. 545-625) set forth, in considerable detail, additional findings and conclusions supporting both increases. As pleaded herein, it "renewed and affirmed" the findings of the January 21, 1942, order (R. 8-9).

It was in pursuance of the permission and authority thus granted to the appellee that he filed tariffs on February 6, 1942, with each the Illinois and the Interstate Commissions, setting forth charges with respect to this Illinois intrastate commutation passenger traffic 10% greater than those then in existence which were the ones authorized by the 1925 order. The effective date of these tariffs was March 8, 1942. The 10% increase therein stated is the matter here in controversy (R. 9, 53).

Had the 1942 order (Exhibit B) not modified the 1925 order and thus permitted the increase in fares here involved, the discrimination against interstate commerce found and ruled out in the 1925 order would have been at once revived. The findings in the 1925 order still stand and the Commission's authority over these fares still continues in effect. It was obviously necessary to raise the intrastate fares coincidental with the present raise of interstate fares if the relationship of equality found necessary and provided in 1925 was to be preserved. It seems hardly necessary to add that the presumption of correctness of the 1925 findings must necessarily continue until

a showing of changed conditions may justify their modification, in a direct proceeding before the Commission. For that matter the Court may well take judicial notice that the general character of the territory and operations involved has not changed materially. No mountain ranges have sprung up at the Illinois-Wisconsin state line since 1925 to produce different operating conditions interstate in this commutation traffic than exist intrastate. Nor are there any other material differences. And we may well assume that any change in conditions deemed by these appellants sufficient to justify a change in those 1925 findings, would now be made the subject of a complaint before the Interstsate Commerce Commission whose latchstring pointedly has been left hanging out.[5]

Appellants by their motion below have admitted these essential facts establishing the source and continuity of the Interstate Commerce Commission's control over these rates, admitted the existence of the findings in the 1925 order and the correctness thereof as pleaded in the complaint herein; and have admitted the existence of the 1936 order and the 1942 order retaining control and modifying the 1925 order so as to permit the increase here in question. Nevertheless, in their attack upon this rate increase they persist in treating the 1942 order as though it were a thing apart, having no connection or continuity with that which had gone before. In so doing they completely disregard and ignore the facts above mentioned, all of which were found by the Court showing that the 1942 order is *not a wholly new order.* It is simply an *amending and*

[5] The order expressly retains jurisdiction "for the purpose of determining, if need be, the lawfulness of any fare or fares, resulting from this order." (R. 34) Such is the procedure approved by the Commission and this Court. *Increases in Intrastate Rates*, 186 I.C.C. 615; *New England Divisions Case*, 261 U. S. 184, 197-9.

supplementing order.[6] It and the previous orders dealing with the intrastate commutation passenger fares of the Chicago and North Western Railway Company in Illinois, *taken together*[6a], completely establish appellee's right to these increases. This failure of appellants to recognize these undisputed facts constitutes, in our view, a fundamental weakness rendering their attack on the 1942 order completely ineffective.

II.

The Increased Passenger Fares Here Involved Were Authorized as a Result of Emergency Conditions in a "General-Revenue" Proceeding. It Granted Blanket Authority to Increase All Rates Described Therein in General Terms.

The Commission's report was before the Court at the hearing on the motion for interlocutory injunction and again on final hearing.[7] The character of the proceeding is best determined by certain facts found and statements made in the report, which may be summarized as follows:

1. The proceeding was instituted shortly after the carriers had been subjected to wage increases of approximately $331,000,000 per year resulting from a strike threat followed by Emergency Board action under the Railway Labor Act. Additional increased costs of $30,000,000 per

[6] Section 16(6), Interstate Commerce Act, vests the Commission with the broadest of power to modify or amend its orders: "The Commission shall be authorized to suspend or modify its orders upon such notice and in such manner as it shall deem proper." (49 U.S.C. 16(6).) Any reasonable modification of a continuing order, such as here, manifestly would be within the discretion of the Commission. *Federal Power Commission* v. *National Gas Pipe Line Company*, 315 U. S. 575, 585. The 1925 order was "supplemented and confirmed" by the 1942 order as was done in *Atlantic Coast Line* v. *Florida*, 295 U. S. 301, 312.

[6a] Obviously, they must be so taken. *Atlantic Coast Line* v. *Florida*, 295 U. S. 301, 312; *Meeker & Co.* v. *Lehigh Valley R. R.*, 236 U. S. 412, 428.

[7] The report was then available only in advance mimeographed form. Certain sheets thereof were reproduced and attached to appellee's statement opposing jurisdiction here, as Appendix C (p. 42-73). In this brief the references are to page numbers in Volume 248 of the Commission's printed official reports, beginning at p. 545.

year to protect their properties against sabotage during the war period, were also shown (p. 549-51).

2. The increases were requested for the specific purpose of yielding additional revenue to enable the carriers to meet the increased expenses and insure their ability to continue rendering adequate and efficient service as contemplated by section 15a of the Interstate Commerce Act (p. 551).

3. The petition for increased rates grew out of national emergency conditions incident to the war and the increases authorized will expire six months after termination of the war (p. 552, 613).

4. These increased operating costs were general in character and applicable to all traffic handled by the carriers, and the only practical method to meet them was a general percentage increase in all rates and fares, with certain exceptions not here material. The petition of the railroads called for a general investigation and estimated that the proposed increases would yield increased revenues of approximately $357,000,000 (p. 551-2).

5. The request was for a general increase in all rates and fares under the jurisdiction of the Commission, with specific reference to those covering intrastate traffic. Notice of the proceeding was given to the states as required by section 13(3) of the Interstate Commerce Act and a committee representing the State Commissions sat throughout the hearing, conferring with the Interstate Commission as to the determination of the issues. A majority of that committee concurred generally in the conclusion expressed in the report of the commission (p. 549, 551-2).

6. The case was characterized and treated by the Commission as a "revenue case, not a rate case" (p. 555). It involved no investigation or inquiry into specific rates or groups of rates (p. 552, 606-7, 609-13).

7. The inquiry relative to proposed increases in passenger fares was nation-wide and specifically included intrastate fares over which the Commission had jurisdiction by reason of previous outstanding 13th section orders. The purpose and intent of the carriers' petition and of the Commission's findings and order were to include an increase in such intrastate fares (p. 552, 549, 564-6). As pointed out above, the Commission's order of January 21st provided for such increase, by specific reference to docket numbers enumerated in the 1936 order (R. 33).

8. The "Conclusions and Findings" set forth in the Commission's report clearly state the general character of this proceeding. Commenting upon the general character of the evidence, the Commission said (p. 606):

> "Our decision in this proceeding cannot be based on the granting of individual, sectional, or particular industrial desires or needs. There will be some element of hardship and sacrifice whatever we do, or if we do nothing."

The Conclusions also contain a short reference to previous general rate cases from 1917 to date involving blanket adjustments of freight and passenger fares, showing this to be the same type of case (p. 606-7). It is pointed out that "the exigencies of the case do not permit" of considering the needs of each railway individually with corresponding adjustment of their respective schedules (p. 609).

9. The authorized 10% passenger fare increase will yield increased revenue for the railroads as a whole in excess of $45,000,000 per year (p. 608).

10. The Commission's finding and conclusion in granting in part the requested freight rate increases is tied up with the passenger fare increases as follows (p. 612):

"We therefore conclude and find that the proposals before us have not been justified as a whole, but that the resulting rates, fares, and charges will be just and reasonable *if passenger fares are increased to the extent already permitted by our order*, and if freight rates and charges are increased to the extent indicated below and as more particularly specified in Appendix 2." (Italics ours.)

A second fundamental and, we believe, fatal weakness in appellants' attack upon the 1942 order arises because of their failure to recognize Ex Parte 148 as a general-revenue or "blanket" rate proceeding. It will be shown later in this brief how this has led appellants into erroneous assumptions and arguments on both points relied upon.

III.

This "Blanket" Method of Rate Making in So-called "Emergency" or "General-Revenue" Cases Has Long Had Specific Approval by This Court.

In the *New England Divisions* case, 261 U. S. 184, the Court pointed out the greatly broadened scope of power and responsibility vested in the Interstate Commerce Commission by Transportation Act, 1920, particularly the requirement that the Commission fix and determine rates which would enable the railroads of the nation as a whole to maintain and operate an adequate national system of railroad transportation (p. 189-91).[7a] The case involved a subsidiary power of the Commission—that of fixing reasonable divisions of through rates between carriers. The number of carriers involved was said to be in excess of six hundred. The order was attacked because the Com-

[7a] In the Court's opinion in *Texas & Pac. Ry. v. Gulf, Etc., Ry.*, 270 U. S. 266, 277, Mr. Justice Brandeis, in speaking of that enactment, said: "By that measure, Congress undertook to develop and maintain, for the people of the United States, an adequate railway system. It recognized that preservation of the earning capacity, and conservation of the financial resources, of individual carriers is a matter of national concern; * * *"

mission had not proceeded to require specific evidence and render a specific adjudication with respect to each carrier. In rejecting that contention the court pointed out that such a requirement in a general case of that nature "would be tantamount to denying the possibility of granting relief" (p. 197).

The opinion by Mr. Justice Brandeis then proceeded to state the historical development of rate making under the Interstate Commerce Act and to find specifically no constitutional obstacle to the adoption or pursuit of this general method of rate making, and to show that it had been previously approved by the Court in *Railroad Commission of Wisconsin* v. *Chicago, Burlington & Quincy R. R. Co.*, 257 U. S. 563, 579, where it was pointed out that serious injustice which might otherwise result from the making of rates in this manner by "blanket" orders "could be avoided, by availing of the saving clause which allows anyone to except itself from the order, in whole or in part, on proper showing" (p. 197 9). Such is the saving clause in the Ex Parte 148 order.

Again in *United States* v. *Louisiana*, 290 U. S. 70, similar contentions were made in an attack upon an increased rate order of the Commission issued under section 13 raising certain intrastate rates in Louisiana. Following the doctrine of the *New England Divisions* case, the court said that section 13 (4) properly construed (p. 75):

> "confers on the Commission the power to raise intrastate rates so that the intrastate traffic may produce its fair share of the earnings required to meet maintenance and operating costs and to yield a fair return on the value of property devoted to the transportation service, both interstate and intrastate. * * *
>
> "* * * § 15a, by its terms, commands the Commission, in providing the required revenue by increasing rates, to deal with the carriers of the nation as a

> whole or in broad classes, and as this Court recognized in the *New England Divisions Case, supra,* 197, 198, this requirement would be nullified and the administrative arm of the Commission paralyzed, if instead of adjudicating upon the rates in a large territory on evidence deemed typical of the whole rate structure, it were obliged to consider the reasonableness of each individual rate before carrying into effect the necessary increased schedule."

The opinion by Mr. Justice Stone goes on to point out that rates thus increased are subject to later adjustment as to any individual rate or group of rates upon a proper subsequent showing to the Commission (p. 76-8). There was a saving clause in the Commission's order similar to that mentioned above in the 1942 order here under consideration. The further complaint in that case that the Commission had made no express finding that the increased intrastate rates would be reasonable was rejected by the Court. It was held that no such specific finding was necessary since the order on its face showed its intent and effect prescribe a level of intrastate rates dovetailing with interstate rates prescribed by the Commission (p. 78).

Reaffirmance of this doctrine is presently at hand in the following quotation from the opinion by Mr. Chief Justice Stone, delivered in March, 1942, in *Federal Power Commission* v. *Natural Gas Pipe Line Company of America,* 315 U. S. 575, 584:

> "The establishment of a rate for a regulated industry often involves two steps of different character, one of which may appropriately precede the other. The first is the adjustment of the general revenue level to the demands of a fair return. The second is the adjustment of a rate schedule conforming to that level so as to eliminate discriminations and unfairness from its details. Such an orderly procedure for establish-

ing the rates prescribed by the Act would seem to be an appropriate means of carrying out its provisions. Section 5 of the Act was modeled on the provisions of the Transportation Act, 49 U. S. C. §§ 13, 15, which have been interpreted as giving to the Interstate Commerce Commission authority to establish a general level of rates and divisions in advance of a schedule to be filed by the carriers. See *New England Divisions Case*, *supra*, 201-02, 203, n. 21. Cf. Sharfman, The Interstate Commerce Commission, vol. 2, pp. 381-82; *Driscoll* v. *Edison Co.*, 307 U. S. 104."

IV.

The Interstate Commerce Commission's Power Under Sections 13 and 15 Is Paramount and Exclusive. It Has Been Exercised Here So as To Leave the Appellants Without Right, Power or Authority to Interfere With Collection of the Increased Fares.

This proposition is quite apparent from the doctrine of the *Wisconsin, New England Divisions* and *Louisiana* cases above. It has been so frequently stated in the decisions of this Court as to have become axiomatic. The paramount character of the authority exercised by the Federal Government is implicit in the power itself under our system of dual sovereignties. In this particular instance it is also written into the Federal Statute specifically by the requirement at the end of paragraph (4) of section 13 to the effect that the rates fixed by the Interstate Commission "shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding."

In section 13, Congress recorded its approval of the Commission's power to avoid discrimination by controlling *intrastate* rates, previously defined by this Court in the *Shreveport* case (*Houston & Texas Ry.* v. *United States*,

234 U. S. 342). As there stated: "It is of the essence of this power that, where it exists, it dominates" (p. 350).

This is but one of numerous Federal Statutes which have been sustained under the Commerce Clause by holdings of this Court that the power of Congress extends to the protection of interstate commerce from interference or injury due to activities which are wholly intrastate. *Labor Board* v. *Fainblatt*, 306 U. S. 601.

In the *Wisconsin* case this Court referred to the provision in section 13 (4) giving the Commission power to remove "any undue, unreasonable, or unjust discrimination against interstate or foreign commerce" and said (257 U. S. at p. 586):

> "* * * it is impossible to escape the dovetail relationship between that provision and the purpose of § 15a."

This "dovetail relationship" was noted and reaffirmed in the *Louisiana Case* (290 U. S. at p. 78-9).

In *Florida* v. *United States*, 292 U. S. 1, 6, it was held, under later amendments of the Act, that the Commission still has the power under section 13 (4) to prescribe intrastate rates solely for the purpose of removing discrimination against interstate commerce "caused by a disparity of intrastate rates viewed from a revenue standpoint." It is definite on the face of the orders relied upon here that the purpose and effect of these orders is to do just that in this case. In the 1942 order the Commission found that the 10% increase *in all passenger fares* was necessary in order to enable the railroads to meet increased expenses arising during the present emergency period; that the increase was necessary to enable them to continue to render adequate and efficient railway transportation service during the emergency; that the increased fares would be rea-

sonable and lawful; and that all outstanding section 13 orders must be modified so as to permit the filing of tariffs naming the increased fares. In so doing, the Commission exercised authority under both sections 13 and 15.

In view of the Commission's previous findings in the 1925 order with respect to the necessity of bringing the Chicago and North Western Railway intrastate commutation fares up to and maintaining them at the level of the interstate commutation fares, it could not well have done otherwise in the 1942 order than was done by specifically modifying the 1925 order so as to provide for a 10% increase in these intrastate fares contemporaneously with the 10% increase in the interstate fares. To have done otherwise would have resulted in a revival of the discrimination against interstate commerce previously condemned in the 1925 order.

V.

Appellants' Attack Upon the Order in Ex Parte 148 Is Purely Collateral in Character. Hence the Order Must Be Given Full Effect Unless Shown To Be Void On Its Face.

The *Wisconsin Rate Case* (257 U. S. 563), as mentioned above, was identical with the case at bar in that it was instituted by a carrier to enjoin state authorities from interfering with intrastate passenger fares authorized by a section 13 order of the Commission. A companion decision rendered by this Court on the same day is *New York* v. *United States*, 257 U. S. 591, which involved the validity of intrastate passenger fares in New York likewise prescribed under authority of section 13. However, the *New York Case* was instituted by state officials, under section 208, Judicial Code, to review and set aside the section 13 order. Marking the distinction between the two cases, the Court said (p. 600):

"This case differs from the *Wisconsin Rate Case*, just decided, *ante*, 563, in that it is a direct proceeding to annul or set aside the order of the Interstate Commerce Commission complained of, brought against the United States and the Commission under the statute. *Skinner & Eddy Corporation* v. *United States*, 249 U. S. 557. The *Wisconsin Rate Case* was a suit by a railroad against the state authorities to prevent the latter from penalizing the railroad for complying with the order of the Commission. To this suit the United States and the Commission were not parties. The defense of the state authorities was a collateral attack upon the order, to prevail in which, they were obliged to show that the order was void on the face of the findings *without regard to the evidence or the absence of it.*" (Italics ours.)

It will be noted at once that the appellants' attack here upon the 1942 order arises under circumstances quite parallel with those which existed in the *Wisconsin Rate Case*. The attack is purely collateral and in no sense does the case here take on the aspects of a direct attack involving a full judicial review of the 1942 order, and the proceedings, facts and findings supporting it. The extent and purpose of the court's inquiry here is to determine whether the order questioned by appellants was void or valid on its face.

VI.

The Cases Relied Upon By Appellants Are Not Applicable Here Because They Were Direct Proceedings To Set Aside the Orders Involved, None of Which was Entered In a General Revenue Case. In the Collateral Attack Here Appellants Have Failed to Show the 1942 Order to be Void On Its Face.

The cases cited in appellants' brief in no way impugn the 1942 general-revenue order. Four of them were *direct*

proceedings in which plaintiffs sought to set aside local rate orders. The fifth was a *direct* proceeding to enjoin the enforcement by state and federal officials of regulations under the National Industrial Recovery Act regarding the production of oil.

In contradistinction, we have here a case where the plaintiff sought protection of rights under orders asserted by him to be valid and where the defendants, attempting to prevent the exercise of plaintiff's rights, assert the invalidity of the second order—strictly a *collateral* attack. The appellant state officials participated in the Ex Parte 148 proceedings and had the right of direct attack by a suit against the United States and the Interstate Commerce Commission, in the statutory manner. They failed to avail themselves of this right of judicial review. Instead, they chose to ignore the Ex Parte 148 order and to act in the teeth of it by entering their so-called suspension order. We bring out in some detail below the inapplicability of these cases upon which appellants rely.

The *Florida Log Case* (*Florida* v. *United States*, 282 U. S. 194), involved rates on intrastate log traffic in a certain section of Florida and the question whether or not they were maintained at such a low level as to prejudice interstate traffic in logs between Florida and Georgia. Contrary to a statement contained in appellants' brief (p. 17), the case was one of *direct attack* and full judicial review of the Commission's order. The court pointed out that the Commission had erroneously undertaken to remove an asserted discrimination against interstate commerce by prescribing a state-wide scale of intrastate log rates, without having prescribed a state-wide scale of interstate log rates or made any findings as to the revenue produced or to be produced by either the interstate rates or the intrastate rates. Hence there was no basis for the Commission's find-

ing of discrimination against interstate commerce. That ultimate finding, standing in lack of supporting findings, was held insufficient to support the Commission's order (p. 212,3).

That was an entirely different situation from what we have here where all basic and jurisdictional findings were made to support the discrimination order in 1925 and the general revenue order in the 1942 case. Furthermore, this is admittedly a collateral attack upon the orders of the Commission here involved, and all with which this Court need concern itself are the questions: Is the Interstate Commerce Commission's 1942 order, amending the 1925 order, *upon its face*, a valid order or a void order? Does it show on its face that the Commission acted within a field over which Congress had given it power to act? If so, the order must be sustained. Taking the two orders together, as must necessarily be done, their validity and adequacy in the face of this kind of attack are clear beyond any question.

Like the *Florida Log Case*, the *Indiana Coal case*, (United *States* v. *C. M. St. P. & P. R. R.*, 294 U. S. 499) was a proceeding to enjoin the enforcement of an Interstate Commerce Commission order—a direct judicial review of the order. It involved a local rate situation entirely. In each case the full record before the Commission, including the evidence, was before the Court for review. There is not, and cannot be, any such situation before this Court in the kind of proceeding we have here. This is made clear by the procedural distinction between the cases of *Wisconsin R. R. Comm.* v. *C. B. & Q. R. R. Co.*, 257 U. S. 563, and *New York* v. *United States*, 257 U. S. 591, above cited.

Wichita R. R. v. *Pub. Util. Comm.*, 260 U. S. 48, also relied upon by the appellants here, was another case of direct attack and full judicial review of a commission order. It was an injunction suit against the Kansas Public Utilities

Commission to set aside that Commisson's order permitting a utility company to increase its rates for electricity. The Commission in permitting the increase simply found that the utility "should be authorized and permitted" to do so (p. 51), without any finding that the old rates were unreasonably low or that the new rates would be reasonable—in fact, without any other finding at all. Since the Kansas Commission's power to take any action in that matter derived exclusively from the Kansas statute giving it the power to prescribe rates to replace rates found to be unreasonable, its order necessarily fell because on its face it was lacking in any expression showing that the Commission had acted within the scope of its authority.

Atchison Ry. v. *United States*, 295 U. S. 193, offers nothing on the subject not already covered in the previous discussion. The basic facts upon which the Commission's decision rested were not disclosed and no definite finding was made as to where the transportation of live stock by a common carrier ends—that being the crucial question involved. The report of the Commission contained conflicting findings and conclusions in that behalf (p. 201-2). Hence, on direct attack the order was set aside. In the *"Hot Oil" Case* (*Panama Refining Co.* v. *Ryan*, 293 U. S. 388) the President's proclamation issued without any finding of fact or statement of reason purporting to justify its issuance was rightly condemned and held unenforceable. Sec. 9(c) of the National Industrial Recovery Act did not require any finding and it was held to be an unconstitutional attempt to delegate legislative power. These decisions, like the others relied upon by appellants, are inapplicable here for the reasons above stated.

Frequently Commission decisions make supporting findings as to various factual elements involved,[8] but these

[8] As we have pointed out, the Commission did so in its Ex Parte 148 report and orders.

while encouraged by the courts and helpful in cases of direct review, are not essential and their absence will not render a Commission decision void, where the decision contains sufficient, otherwise, to show that the Commission acted within the scope of its statutory authority. Only the basic or "quasi-jurisdictional" findings need appear, even in *direct* proceedings of judicial review. *United States* v. *B & O. R. R. Co.*, 293 U. S. 454, 463-5. In that case under the Locomotive Inspection law the Commission had no authority to prescribe power reverse gear equipment upon locomotives unless such installations would eliminate or reduce "unnecessary peril to life or limb." The Commission's report and order in that case contained no such finding and the Court therefore held that its order prescribing such installations was void (p. 463). Compare *Lubetich* v. *United States*, 315 U. S. 57, 59, where, on direct appeal, omitted findings were held not quasi-jurisdictional and the order was upheld.

The quasi-jurisdictional findings appear on the face of the orders here. In the 1925 section 13 proceeding the Commission found (1) no conditions within Illinois justifying the maintenance of intrastate commutation passenger fares lower than the corresponding interstate fares, (2) the maintenance of such lower intrastate fares subjects interstate passengers to undue prejudice and disadvantage and unjustly discriminates against interstate commerce, and (3) to remove that discrimination the intrastate fares should be raised to the level of the interstate fares (R. 30). Those findings are now supplemented by the findings in the 1942 order (1) that the increase in fares proposed is necessary to enable petitioners to continue rendering adequate and efficient railway transportation service during the present emergency, and (2) that the increased fares are reasonable and lawful (R. 33). By these findings action by the Commission within the juris-

diction conferred upon it in sections 13 and 15 of the Interstate Commerce Act is established. These, and these alone, were the basic or quasi-jurisdictional findings such as have been held essential in direct proceedings of review.[8a]

However, additional findings were made in Ex Parte 148. The Commission's report shows that from evidence of a general nature it found the carriers needed increased revenues due to increased expenses during this emergency period; that these expenses were arising in the handling of all kinds of traffic everywhere, including passenger traffic of all kinds; that the passenger traffic should bear its share of the increased cost; that the proposed increased passenger fares would produce $45,000,000 per year and upwards; that this would be an appropriate amount for the passenger traffic as a whole to bear; that the general 10% increase should be spread upon all passenger rates subject to the Commission's jurisdiction, including those prescribed in previous section 13 proceedings and with specific reference to the very rates involved in this case, referring to them by specific docket number; and that the exigencies of the case did not permit of further refinements such as considering the needs of individual railroads and adjusting their rate schedules separately.

In Ex Parte 148, the "paramount question" under the applicable statutes was simply whether or not a general raise of the level of *all* rates was needed in order to maintain an adequate national rail transportation system. The Commission, in the terms of the statute, found the proposed increase in passenger fares was "necessary," "reasonable" and "lawful". (R. 33). These quasi-jurisdictional findings, alone, would have been sufficient to sup-

[8a] The "two sets of findings" should be "read together", *Atlantic Coast Line v. Florida*, 295 U. S. 301, 312, cited in note [6a], supra.

port the order against a direct attack; but regardless of that they show the order valid on its face and hence invulnerable to the collateral attack in this suit. The further detailed supporting findings, summarized above, show that the order would have been immune to attack on direct review in any case.

The lack of substance in appellants' point as to the inadequacy of findings in the 1942 order is further demonstrated by reference to that part of appellants' brief entitled "The Application of the Foregoing Authorities to the Findings in the Instant Case" (p. 27-8). There, the only *specific* complaints made as to lack of findings are these:

1. That there was "no finding of fact showing that the rates before the authorized increase were confiscatory"; and

2. That the findings did not "indicate the 'extent' of the inadequacy of the previous rate structure or 'expected loss' or deficit to be anticipated from the previous rates."

In fine, appellants' contentions narrow down to the proposition that the absence of these specified findings has denied them due process of law. Such is the final assertion in their behalf and they endeavor to give it force by quoting excerpts from the decisions which we have analyzed above, which they characterize as "independent proceedings in equity."

That any finding in the Ex Parte 148 order, as to rates being confiscatory, would have been entirely inappropriate and beyond the scope of the investigation in that proceeding is obvious in view of the nature of the proceeding. The carriers in proving their need for increased revenues to meet the huge wage increase and other expense suddenly imposed upon them in excess of $350,000,000 per year had no occasion to attack the previously existing general rate level as confiscatory. The only issue before the

Commission was whether or not the carriers would need a general rate increase in order that they might function properly during the war and be enabled to render needed transportation for the nation during the emergency period. The facts found by the Commission showed the need. Authority to make the increase in rates was granted by the Commission precisely as the congressional mandate required (49 U. S. C. Sec. 1, 13 and 15a, *supra*). The Commission in its report said:

> "The increases herein authorized grow out of the emergency caused by the war, and our authorization will be limited to that emergency" (248 I.C.C. at p. 613).

Likewise, there was no occasion for the Commission to make any findings as to the extent of inadequacy of the then existing rate level or any expected loss or deficit. The Commission found these huge increased costs had been suddenly imposed upon the carriers. These were out-of-pocket costs. The need for more revenue was plain and imperative. The only question was "how much." The Commission in its discretion granted less than was estimated to meet the increased costs, but granted prompt relief.

As we have pointed out above, the general character of the proceeding precluded individual consideration of local rate situations. The findings of the 1925 order as to the intrastate suburban fares yielding less than operating costs and the necessity for maintaining them on the interstate level were not made the subject of special investigation and re-examination in Ex Parte 148. That part of the national rate structure "held" and "maintained" by previous orders of the Commission, received the same consideration and treatment as all others. Previous findings in individual cases were not modified or

disturbed and there was no occasion for so doing. Any injustice which might arise from the imposition of this 10% increase upon the previously prescribed rates was open to correction by appropriate application and showing in the individual case. If the appellants had any doubt as to the present accuracy of the 1925 findings, the "saving clause" pointed their course. Thereby, the 10% increase applied to these Illinois intrastate rates in the general-revenue case met the test of constitutional rate-making approved by this Court.

VII.

The Claim That the Ex Parte 148 Order Does Not Purport to Authorize These Increased Rates Is Disproven by Both the Purpose and the Plain Terms of the Order, Which Are Confirmed by a Later Order of the Commission.

Adopting the devious argument of the *Transit Commission case*, appellants contend the effect of the Ex Parte 148 order was merely to withdraw generally Interstate Commerce Commission opposition to increases in intrastate rates. The argument is built up to that point by taking the word "permit" (used in the order) out of its context and giving it a literal and independent meaning. To support their conclusion the false premise is indulged in that there existed some Federal opposition to increases in intrastate rates—an assumption belied by the whole tenor and effect of the Interstate Commerce Commission's report and order.

The Federal Government represented by the agency of Congress fully authorized to act, here determined the necessity for increasing *all* passenger fares, both *interstate* and *intrastate*. It went further. It specifically provided for the increase of certain intrastate fares, of which it had previously taken jurisdiction, by amending its orders

previously entered and then outstanding so as to provide for such increase. The amending order was, by its terms, required to be filed in the docket of each proceeding in which those previously entered orders had been made (R. 33). Such filing having been made, thereby modification of the outstanding orders was completed. Specific reference was made to section 13 cases in which the Commission then held jurisdiction over intrastate rates (including those here involved). Its outstanding orders respecting these rates were singled out as a class from all other outstanding orders, to make doubly sure the Commission's intention and purpose to authorize the 10% raise of *intra*state as well as *inter*state rates subject to its jurisdiction.

Surely it is perversion itself to suggest, as is here suggested, that the word "permit" was used to indicate a withdrawal of federal opposition of some vague kind or other to the proposed increase in these intrastate rates. For that matter, what objection could the federal agency *ever* have in *any* case against intrastate rates being brought up to, or maintained on, a level of equality with interstate rates? The history and existence of section 13, referred to above, prove the Commission could only have objections in cases where intrastate rates were being reduced or maintained at a level *below* the interstate rates.

The further conclusion of the New York Judge that the word "permit" was used so that the carriers would be free to make increased fare applications to state regulatory bodies is even less worthy than the first assumption. The pertinent part of the order reads (R. 33):

> "* * * all outstanding orders, as amended, * * * authorizing or prescribing *interstate and intrastate rates* or *bases of fares*, be, and they *are hereby, modified*, effective *concurrently with the establishment of the fares herein approved, only to the extent neces-*

sary to permit the increase herein authorized to be *added to the interstate and intrastate fares approved or prescribed in, or maintained or held by virtue of,* said outstanding orders. * * *" (Italics ours.)

There was, of course, no permission of the Interstate Commerce Commission needed by any carrier to enable it to make increased rate applications to state authorities with respect to such intrastate rates or fares as were not already subjected to control by the federal agency. And as to intrastate rates which had been previously subjected to such control—*i.e.*, "prescribed in" and "maintained" and "held by virtue of" outstanding section 13 orders—there could be, equally, no occasion either for the carriers to seek, or the Interstate Commission to grant, permission to apply to state authorities. Being already fully under the Interstate Commerce Commission's paramount and exclusive jurisdiction and control, previously exercised and re-exercised, "maintained" and "held," applications to state authorities would have been improper and contradictory in the extreme. Had the Interstate Commission intended such course to be pursued an obvious prerequisite would have been to relinquish its control over those rates. This it has not done, but on the contrary it has in plain and unambiguous terms *retained* and *again exercised* its jurisdiction and control. To argue that permission was granted without such a specific relinquishment of control is to argue the ultimate of incongruity. Not only would "interstate trade * * * be * * * impeded by the rivalries of local governments,"[9] but there would be inevitable conflict and discrimination due to varying rate levels prescribed by numerous state commissions —the rule "by many masters"[10] to avoid which these outstanding orders were made.

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[9] *Shreveport Case*, 234 U. S. 342, 350.

[10] *Shreveport Case*, 234 U. S. 342, 359-60.

There is no difficulty in understanding the Commission's use of the word "permit" in the context of its order wherein it amended its previous outstanding orders, when one considers for a moment the mechanics of this rate increase. Ex Parte 148 being a general proceeding and having been initiated by the carriers in advance of their filing of any tariffs, the Commission's order itself necessarily could not establish the increased rates and fares. That could only be accomplished by the subsequent action of the carriers in filing new or supplemental tariffs with respect to the very great number of rates and fares in existence all over the country and set forth in numerous existing tariffs already on file. The carriers' petition in Ex Parte 148 was in the form of a request for permission from the Interstate Commerce Commission to file such new or supplemental tariffs naming increased charges. This is shown by the very first paragraph of the Commission's report, which states that the railroads "ask us to make certain orders necessary to enable them to increase their rates, fares and charges." Referring further to this requested general authorization, the Commission said (248 I.C.C. at p. 552): "In order to make such authorization effective, *it will be necessary for petitioners to have permission to make such increases effective on short notice*, by simple forms of supplements to existing schedules. *It also will be requisite that we modify our outstanding orders to the extent necessary to permit petitioners to make effective the increases approved by us*, and to enter orders authorizing departures from section 4 of the act." (Italics ours.) And the order itself points out some particulars as to how the permitted tariffs or supplements may be submitted and filed and the time when they may become effective. It established a *basis* for the new and increased rates, but did not establish the rates.

In other words, instead of proceeding as is customary with respect to local or group rate changes by filing tariffs or tariff supplements, and then waiting to see whether or not opposition develops and the tariffs are suspended pending hearing and consideration by the Interstate Commerce Commission, the carriers here proceeded by the other method which we have pointed out had been expressly approved by the Supreme Court in other general cases. That is to say, the carriers sought permission to file, and approval of, their proposed tariffs *in advance* and upon less than the thirty day statutory notice. Hence, the use of the word "permit," a perfectly well chosen word in the situation in which it was used.

The use of the word "permit" was also particularly well chosen with respect to rates authorized or prescribed in outstanding orders like that in Docket 11703, here involved, wherein the carrier had previously been "notified and required to cease and desist from practicing * * * unjust discrimination" and had been ordered "to establish, put in force, and maintain" the then approved basis of rates "until the further order of this commission" (R. 31). In modifying that mandate, what form of expression could have been more appropriate than that adopted? The expression used made it clear that the old command was modified so as to permit 10% to be added to the previously prescribed rates and that this was the only change permitted. The carriers' petitions and the Commission's report in Ex Parte 148 leave no room for contention that anything else was intended or desired. The 1925 order in Docket 11703, as thus modified, now requires appellee to "maintain" the increased fares named in the tariffs effective March 8, 1942, those tariffs not having been suspended by the Interstate Commerce Commission. Failure to observe those tariffs would subject appellee to severe

penalties under sections 6 and 10 of the Interstate Commerce Act. (R. 12; 49 U.S.C. 6(7), 10(1).)[10a] The mandatory aspect of the 1925 order has not been affected by the 1942 modification.

The New York judge also fell into error by attaching an undue significance to that part of the recitals in the Interstate Commerce Commission's 1942 order which states that "* * * similar application has been or will be made to the regulatory authority of the respective States for permission to increase similarly petitioners' intrastate rates, fares and charges, * * *." Such applications were necessary as to the great residuary body of intrastate rates and fares of which the Interstate Commerce Commission has never had occasion to take section 13 jurisdiction. Not all states refused after 1920 to raise the level of intrastate rates to conform to that of the interstate rates. Those that did not so refuse still have jurisdiction over their own state rates. They will continue to have it unless and until there is occasion to file a section 13 complaint and obtain a finding of undue discrimination against interstate commerce. Hence the necessity for petitions to state authorities as to a great mass of intrastate rates *not, however, including those as to which section 13 orders already were outstanding.* The propriety of the recital is therefore evident. Its presence in the order is completely accounted for without indulging in the wholly mistaken assumption made by the New York judge that it is indicative of an intent by the Interstate Commerce Commission that the carriers would or should go to the State Commissions in the section 13 instances.

To adopt appellants' contention would render completely ineffective that very substantial part of the Commission's order in Ex Parte 148 which authorizes the 10% increase

[10a] "The carrier was not at liberty to take the law into its own hands and refuse submission to the order without the sanction of a court." *Atlantic Coast Line v. Florida*, 295 U. S. 301, 311.

in intrastate passenger fares of which it had previously taken jurisdiction under the congressional mandate of section 13, Interstate Commerce Act. No less than 22 such cases are listed by docket number in the 1936 order of the Interstate Commerce Commission, and included by specific reference in the 1942 order. Among them is Docket No. 11703, involved here. To so construe this order as to nullify such a substantial portion of it would do violence alike to common sense and the legal principles to which we have referred above.

Furthermore, if the Interstate Commerce Commission did not intend its amendment of outstanding section 13 orders to permit, of itself and without State Commission action, the raising of state rates under the continuing control of the Interstate Commerce Commission by ten per cent, the latter Commission would have suspended the tariffs scheduled to become effective March 8, 1942, as to those intrastate rates, pending State Commission approval. This it did not do, though by that time it had become clear, in the case of these Illinois intrastate commutation fares at least, that the raise was being scheduled solely on Interstate Commerce Commission authority.

If, with reason, any doubt ever could have existed about the *intent* of the Interstate Commerce Commission's 1942 order, that doubt must have been completely dispelled by the Commission's own action through its order of March 24, 1942, in Docket No. 11860, *Montana Rates and Fares*, Appendix A hereto. It is seen therefrom that a section 13 order entered in 1921 had required the maintenance of intrastate fares on the same basis as interstate fares in Montana; that in 1938 the Interstate Commerce Commission, finding that the State authority theretofore had adopted the same bases of fares as those which it required interstate, vacated its 1921 order because it no longer served

any necessary or useful purpose; and that in view of the disparity between the Montana intrastate rates and the proposed increased interstate rates under the order in Ex Parte 148, the vacation of the old 1921 Montana order has now been set aside as improvidently entered and it has been revived so as to "protect" the Montana intrastate rates and make them subject to the present 10% increase, the same as the interstate rates. The present situation in Montana is specifically found to justify "the continued maintenance and observance of" the 1921 order as modified. If, as appellants claim, the order in Ex Parte 148 was merely a permission to the carriers to go back to state authorities where section 13 orders were outstanding, no action at all by the Interstate Commerce Commission would have been necessary in the Montana situation, *because there was no outstanding section 13 order, the original one having been vacated.* But the Commission, by *reinstating* the section 13 order previously vacated, put the Montana intrastate fares up to the interstate level through the application of its order in Ex Parte 148 in precisely the way that these Illinois intrastate commutation fares were increased.

This demonstrates, perhaps more forcefully than anything we might say, the Interstate Commerce Commission's belief and intention as to the validity and effectiveness of its order here in question, as respects its applicability to increases in intrastate rates already within its control under section 13. There is and can be nothing substantial in appellants' contrary contention.

VIII.

As An Independent Ground of Relief, Enforcement of the Appellant Commission's Order was Properly Enjoined Because the Fares Thereby Prescribed Were Admittedly Confiscatory.

The Interstate Commerce Commission found in its 1922 order that the 20% increase in Illinois intrastate commut

tation fares thereby permitted would still fail to produce sufficient revenue to fully meet the cost of rendering the service (R. 26). The complaint herein shows that the expenses necessarily incurred in furnishing this service have greatly increased since 1925; that heretofore appellee has been furnishing the service at a total expense considerably in excess of the total revenues derived therefrom; and that when the complaint was filed (after the effective date of the increased fares here involved) the service was still being furnished at a loss and without any return upon the more than $20,000,000 value of the property used by appellee in rendering the service (Section XIV, R. 14).

The Court found that the purport and effect of the appellant Commission's order of February 18, 1942, was to prescribe fares for the appellee at the previously existing noncompensatory level and to prohibit the appellee from increasing or modifying those fares unless and until permitted to do so by further order of the appellant Commission at some indefinite time in the future; that the fares thus prescribed would not produce sufficient revenue to meet the cost of the service; that for some years such service had been rendered by appellee at a loss and without deriving any return whatsoever upon the value of the property devoted to the service; and that even with the increase therein made effective March 8, 1942, as authorized by the Interstate Commerce Commission, the appellee is still realizing a loss from this service and deriving no return whatsoever upon the property investment (Findings 11-13, inclusive; R. 53). The Court concluded that enforcement of the appellant Commission's order imposing these confiscatory rates would deprive appellee of his property without due process of law in violation of Amendment XIV (Conclusion 5; R. 56).

The appellant Commission's order (R. 35-7), called a "suspension order," undertook to establish these admittedly confiscatory rates "until the period of suspension and any extension thereof has expired." The immediate period of suspension stated in the order was until July 6, 1942. However, that Commission is given authority under section 36 of the Public Utilities Act of Illinois to extend this suspension period for an additional six months. (R. 11; Appellants' Brief, 3, Ill. Rev. Stat., Ch. 111⅔, § 36).

In *Prendergast* v. *N. Y. Tel. Co.*, 262 U. S. 43, 49-50, where it was shown that rates yielding less than a fair return were sought to be imposed on a temporary basis pending further procedure before the New York Commission, it was specifically held that the temporary character of the rates would not deprive the company of its right to relief at the hands of the court. Referring to the New York Commission's orders prescribing those rates, the Court said (p. 49):

> "They were final legislative acts as to the period during which they should remain in effect pending the final determination; and if the rates prescribed were confiscatory the Company would be deprived of a reasonable return upon its property during such period, without remedy, unless their enforcement should be enjoined. Upon a showing that such reduced rates were confiscatory the Company was entitled to have their enforcement enjoined pending the continuance and completion of the rate-making process."

Again in *Northern Pacific* v. *Department of Public Works*, 268 U. S. 39, where the rates fixed by the Washington State Commission were for an experimental period of twelve months and where, *as here*, the carriers showed the rates so fixed would not yield sufficient revenue to meet fully the operating expenses, the Court, in holding the carriers entitled to an injunction, said (p. 45):

"The invalidity was not avoided by making the order, in terms, for an experimental period. The rates as to which the evidence was primarily directed were those in force before and during the hearings. If even the existing rates were confiscatory, as the carriers' evidence embodying the results of ample experience tended to show, there could be no reason for awaiting the test of the much lower rates which were prescribed. The cases which applied the principle of awaiting the result of an experimental period for untried rates have no application here." (Citing cases.)

Believing these decisions state sound legal principles fully applicable to the instant case, appellee asserts that here is an additional and independent ground upon which the decision below should be affirmed. Assuming for argument's sake, that the defendant Commission had jurisdiction over the rates here involved, since it has admitted they are now confiscatory and that even the new rates do not produce revenue equalling the cost of the service, what right or purpose possibly could have been served by further procedure before that Commission?

That its order prescribing the admittedly confiscatory rates was entered without previous notice to plaintiff and without hearing, we assume will not be urged to support the argument made in appellants' reply to appellee's motion to dismiss that the issue of confiscation should have been raised by appellee and tried out before the defendant Commission. That Commission already knew from its participation in the I.C.C. Docket No. 11703 proceeding and the 1925 order that the rates which it, in 1942, was attempting to prescribe were confiscatory; and it now admits that the increased rates which it attempts to nullify are not compensatory. This is a situation quite different from the usual type of rate case involving the element of confiscation. We believe this extraordinary instance of a State

Commission seeking to enforce rates known and admitted by it to be confiscatory brings the case within the rule of the authorities we have cited.

Since the requisite "zone of reasonableness"[11] was known in advance to have been non-existent there obviously could have been no room for any exercise of the defendant Commission's rate making process. The constitutional requirement of due process demands no such futility of action.

CONCLUSION.

The Interstate Commerce Commission in its 1942 order further exercised its retained jurisdiction over the intrastate fares here involved by modifying its previous section 13 order so as to authorize fares 10% higher than those by it prescribed in 1925.

Its intention and purpose in so doing are clear on the face of its order and are confirmed by its failure to suspend the tariffs and by its subsequent order in the *Montana* Case.

Contrary to appellants' contentions, the findings were adequate to support the order. They were sufficient for all purposes, although in this case of collateral attack the inquiry goes no further than to determine validity on the face of the order.

[11] *Federal Power Commission* v. *Natural Gas Pipeline Co.*, 315 U. S. 575, 585.

The District Court's decision should be sustained for the foregoing reasons and on the further independent ground that the pre-existing rates sought to be enforced upon appellee by appellants were admittedly confiscatory.

We therefore respectfully submit that the judgment of the District Court should be affirmed.

CHARLES M. THOMSON,
Trustee of the property of Chicago and North Western Railway Company,
Appellee,

By WILLIAM T. FARICY,
NYE F. MOREHOUSE,
P. F. GAULT,
His Attorneys.

December 28, 1942.

APPENDIX A.

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 24th day of March, A. D. 1942.

No. 11860

MONTANA RATES AND FARES

In the Matter of Intrastate Rates and Fares of the Chicago, Burlington & Quincy Railroad Company and Other Carriers in the State of Montana

IT APPEARING, That the Commission on March 31, 1938, made its order in the above-entitled and other proceedings therein listed requiring the parties to the respective proceedings to show cause on or before May 4, 1938, why orders previously entered in such proceedings and still outstanding should not be vacated and set aside in so far as they require the continued maintenance and observance of the rates, fares, charges, allowances, rules, regulations, or practices, separately prescribed in said outstanding orders;

IT FURTHER APPEARING, That with respect to this proceeding the said order of March 31, 1938, had reference to the outstanding order of January 11, 1921, as modified, made upon report appearing at 60 I.C.C. 61, which latter order prescribed for the removal of the unlawfulness therein found, the interstate bases of fares for the transportation of passengers, of excess-baggage charges, and of surcharges upon passengers traveling in sleeping cars and parlor cars, for application on intrastate commerce within the State of Montana, because the interstate bases in effect when said order of March 31, 1938, was made were on the same or practically the same bases as required by State authority, and that therefore the continuance in force and effect of said outstanding order served no necessary or useful purpose;

IT FURTHER APPEARING, That no return was filed by any party to said order of March 31, 1938, whereupon the

Commission on June 6, 1938, made its order in all those proceedings by which all said outstanding orders, in so far as they required such continued maintenance and observance, were vacated and set aside

IT FURTHER APPEARING, That railroad carriers operating within the State of Montana, by petition solely in this proceeding filed February 4, 1942, inform the Commission that through oversight these petitioners failed to show cause in response to said order of March 31, 1938, why said order of January 11, 1921, should not have been vacated and set aside, and aver that for this reason the intrastate passenger fares in Montana are technically no longer protected by an outstanding order made pursuant to section 13 of the Interstate Commerce Act; that by order of January 21, 1942, in Docket Ex Parte No. 148, *Increased Railway Rates, Fares, and Charges, 1942*, this Commission approved increased passenger fares, reflecting an increase of 10 percent over then present fares, as proposed by railroads throughout the United States, which increased fares became effective February 10, 1942, on interstate traffic, and that said order of January 21, 1942, modified all outstanding orders to the extent necessary to permit the increase authorized by said order of January 21, 1942, to be added to the interstate and intrastate fares approved or prescribed in, or maintained or held by virtue of, said outstanding orders; and that, inasmuch as said order of January 11, 1921, has been vacated, and a statute of the State of Montana prescribes a basis for maximum fares which would be exceeded if the Montana intrastate fares were all increased by 10 percent, petitioners pray that the Commission reinstate said order of January 11, 1921, upon the ground that the latter order was vacated improvidently by said order of June 6, 1938;

IT FURTHER APPEARING, That no reply to said petition has been received from any party, although the petition was duly served upon all parties by these petitioners by mailing a copy to each of them;

AND IT FURTHER APPEARING, That the existence of said statute affords good cause for the continued maintenance and observance of said order of January 11, 1921, as modified, and that therefore said order of June 6, 1938 was made improvidently.

IT IS ORDERED, That said order of June 6, 1938, in so far as it relates to this proceeding, be, and it is hereby, vacated and set aside; that said order of January 11, 1921, as modified prior to June 6, 1938, is restored and reinstated; and that this order shall take effect April 4, 1942.

By the Commission.

(SEAL.) W. P. BARTEL,
Secretary.

APPENDIX B.

Interstate Commerce Act.

National Transportation Policy.

(49 U.S.C.A. Ch. 1, pocket part, p. 3)

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act (chapters 1, 8, and 12 of this title), so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions; —all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this

Act (chapters 1, 8, and 12 of this title) shall be administered and enforced with a view to carrying out the above declaration of policy.

Section 13

(49 U.S.C.A. § 13 (3)-(4), pocket part, p. 82)

(3) Whenever in any investigation under the provisions of this part, or in any investigation instituted upon petition of the carrier concerned, which petition is hereby authorized to be filed, there shall be brought in issue any rate, fare, charge, classification, regulation, or practice, made or imposed by authority of any State, or initiated by the President during the period of Federal control, the Commission, before proceeding to hear and dispose of such issue, shall cause the State or States interested to be notified of the proceeding. The Commission may confer with the authorities of any State having regulatory jurisdiction over the class of persons and corporations subject to this part or part III with respect to the relationship between rate structures and practices of carriers subject to the jurisdiction of such State bodies and of the Commission; and to that end is authorized and empowered, under rules to be prescribed by it, and which may be modified from time to time, to hold joint hearings with any such State regulating bodies on any matters wherein the Commission is empowered to act and where the rate-making authority of a State is or may be affected by the action taken by the Commission. The Commission is also authorized to avail itself of the cooperation, services, records, and facilities of such State authorities in the enforcement of any provision of this part or part III.

(4) Whenever in any such investigation the Commission, after full hearing, finds that any such rate, fare, charge classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful, it shall prescribe the

rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding.

Section 15a (2)

(49 U. S. C. A. § 15a (2), pocket part, p. 114)

In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the *movement of traffic* by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

No. 178

ILLINOIS COMMERCE COMMISSION, JOHN D. BIGGS, WILLIAM PARRILLO, et al.,

Appellants,

vs.

CHARLES M. THOMSON, AS TRUSTEE OF THE PROPERTY OF CHICAGO AND NORTH WESTERN RAILWAY COMPANY,

Appellee.

REPLY OF APPELLEE TO BRIEF OF AMICUS CURIAE, CITY OF NEW YORK.

WILLIAM T. FARICY,
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Appellee.

REPLY OF APPELLEE TO BRIEF OF AMICUS CURIAE, CITY OF NEW YORK.

Foreword.

Although the brief of the City of New York, as *amicus curiae*, goes considerably outside the record, and attempts to bring into this case matters involved in a New York dispute in which *amicus curiae* is interested, appellee deems it advisable, even in the short time now remaining, to call the Court's attention to some of the errors and fallacies upon which *amicus curiae's* position rests.

I.

The 1925 Section 13 order related intrastate and interstate commutation fares and was still in effect in 1942, unchanged by the intervening 1936 order.

The brief which the City of New York filed as *amicus curiae* in this proceeding, dated January 5, 1943, is based on an underlying fallacy. It assumes that the 1925 Section 13 order of the Interstate Commerce Commission, applicable to the North Western, was one relating Illinois intrastate *commutation* fares to interstate *single ride* fares. See pages 12, 13, 25, 26, and 27 of the *amicus curiae* brief. In fact, the relationship established by the 1925 order was one between Illinois intrastate *commutation* fares and interstate *commutation* fares in the same territory and had nothing to do with the 3.6¢ basic one-way single-ride passenger fares. The North Western's Illinois-Wisconsin interstate commutation fares and its Illinois intrastate commutation fares were on the same level prior to 1920, and together were maintained on a common basis unrelated to the one-way fares (R. 21-2, 26). The latter were on "a materially higher basis" (R. 29). In 1920 the Interstate Commerce Commission ordered a 20% increase in the interstate commutation fares. This was put into effect and left a precipitous rise at the state line (R. 22, 23) and resulted in the low intrastate commutation fares being used to defeat the higher interstate fares (R. 29, 30) by combinations on the stations closest to the Wisconsin-Illinois state line. The 1925 order of the Interstate Commerce Commission corrected this situation and established a continuing and non-discriminatory relationship between the state and interstate *commutation* fares.

Amicus curiae, having erroneously assumed the existence of a relationship between intrastate *commutation* fares and interstate single-ride fares (in other words, a relationship between apples and pears), proceeds to the wholly mis-

taken assumption that the 1936 order of the Interstate Commerce Commission in Docket 26550, lowering the basis for *single ride* fares, in some way changed or destroyed the relationship between interstate and intrastate commutation fares established and maintained by virtue of the 1925 order. In truth, there was absolutely no change made by the 1936 order as to either the level or the relationship of the interstate and intrastate *commutation* fares, but, as the record shows (R. 7) and the lower court found (R. 51), those fares and the relationship continued untouched by the 1936 order.[1] In that order the Interstate Commerce Commission was careful to preserve the continuing effect of the Section 13 relationship that it had established and over which it had jurisdiction, including this relationship of Illinois intrastate commutation fares and interstate commutation fares, by a specific statement that such Section 13 orders affecting intrastate passenger fares or charges were modified "to the extent only that may be necessary to permit the bases of fares and charges herein prescribed or authorized to become effective or to continue in effect, as the case may be."[2] It is evident, therefore, that the position of *amicus curiae*, to the effect that the 1936 order of the Interstate Commerce Commission "put to death" the 1925 order of the Interstate Commerce Commission as to these Illinois intrastate passenger fares, falls of its own weight.

At page 3 of the brief of *amicus curiae*, about the middle of the page, in discussing the 1936 order of the Interstate Commerce Commission, the statement is made that this order terminated certain Section 13 orders and that "among

[1] This result obtained because these commutation fares were already maintained "subject to a maximum of 2 cents per mile" (R. 31), the same maximum prescribed in the 1936 order.

[2] The prescribed level of other fares (single ride) covered by other orders in the same docket number as the 1925 order (11703) was reduced by the 1936 order. This explains the modifying reference to docket 11703, even though the commutation fares in the same docket number were left untouched.

the orders so discharged was the 1925 Section 13 order in Docket No. 11703, by which the North Western's intrastate commutation fares had been correlated with the fare structure in Ex Parte 74." The fact is precisely the opposite. The 1925 Section 13 order applicable to these Illinois intrastate commutation fares was preserved in full effect, because the only changes required in any Section 13 orders were what was necessary to permit the bases of fares and charges prescribed in the 1936 case to become effective, and, because of the circumstances already noted, *no change whatever was required or made in the North Western's commutation fare structure, state or interstate.*

At page 12 of the brief of *amicus curiae* the fallacious assumption hereinbefore described is again indulged in for the purpose of relating intrastate commutation fares of the North Western to interstate fares for single-ride travel, to which they were not intended to be related at all. The basic relationship of interstate and intrastate commutation fares, maintained for many years until disrupted in 1920 but restored in 1925 *and continued ever since*, is completely ignored. *Amicus curiae* then follows with the remainder of page 12 and page 13 of its brief by working out some percentage relationships between the apples and pears, thus sought to be compared. *Amicus curiae* persists in ignoring the real and fundamental relationship, which is between commutation fares, state and interstate, neither of which bears any established relationship to the single-ride fares.

At page 25 *amicus curiae* falls into the same error. Again the assertion is made that the 1925 order "was six years dead" and that the North Western was attempting to breathe new life into the order. Since that order, continued in effect through the 1936 proceeding, and the rates here involved and those to which they were related (the inter-

state commutation fares) were untouched and unchanged by the 1936 order, and the Commission was very particular to limit its changes of Section 13 orders to what were necessary to permit the prescribed levels of single-ride fares, it is clear beyond argument that the 1925 order was in full and reasserted vigor at the time the 1942 order was made. The same observations may be made about a similar statement of *amicus curiae* on pages 26 and 27 of its brief.

II.

The recital in the 1942 order that applications would be made to state authorities is completely accounted for by the fact that in many states no Section 13 jurisdiction had ever been exercised by the Interstate Commerce Commission.

Amicus curiae also persists in the error into which its argument led the New York court in the *Transit Commission Case*, 33 N. Y. S. (2) 993, already thoroughly discussed in the briefs heretofore filed. *Amicus curiae* lays great stress on the recital in the 1942 order of the Interstate Commerce Commission that "similar application has been or will be made to the regulatory authority of the respective states for permission to increase similarly petitioner's intrastate rates, fares and charges." This recital was due to the fact that in many states no Section 13 action of the Interstate Commerce Commission ever has been necessary to put rates and fares on the interstate level. Unless, therefore, there was, as here, an outstanding and continuing Section 13 order, the Interstate Commerce Commission would not have had authority to raise the intrastate rates and fares, and petitions to state authorities were necessary. A realization of this fact will answer what is said in the brief of *amicus curiae* at the bottom of page 3 and on pages 15, 17, 21, and 24 (see appellee's brief, 34-5).

III.

Amicus Curiae's argument would hamstring the Interstate Commerce Commission's efforts to preserve a non-discriminatory relationship already lawfully established by it.

What *amicus curiae's* argument would produce, if adopted, would be a hamstringing of the Interstate Commerce Commission's power, heretofore exercised and now continuing, to raise and lower together in an orderly way related parts of a rate structure which that Commission has found it necessary to establish and maintain in order to prevent prejudice and discrimination against interstate commerce and persons and localities therein and preference of intrastate commerce and persons and localities in intrastate commerce. As the record shows, it took five years (1920-1925) to get the unlawful and prejudicial relationship between Illinois intrastate commutation fares and the interstate commutation fares corrected. *Amicus curiae* would destroy the efficient working of the Interstate Commerce Commission in retaining non-prejudicial relationships once established. The Interstate Commerce Commission's sensible and practical method is that where it has once made the necessary jurisdictional findings, as it did in the 1925 order, and established the relationship, it continues the order and the relationship in effect, and when a change is made through a general-revenue proceeding in the level of the interstate rates, it amends its outstanding orders fixing the related intrastate rates to the extent necessary (and only to that exent) to preserve the non-discriminatory and non-prejudicial relationship. If *amicus curiae's* views prevail there will be recreated the very type of discrimination already removed, because it is manifest to anybody that when a change is made in an interstate level, without at the same time changing the intrastate

level *over which a continuing jurisdiction already exists*, the Commission, the carriers, and the public are confronted all over again with the pre-existing prejudicial and discriminatory situation. No such inefficient method is required by Section 13 of the Interstate Commerce Act. The Commission's jurisdiction is a continuing one, and once asserted and continued, need not be hamstrung by prohibiting, to the detriment of interstate commerce, the amending (in the general-revenue case) of its orders applicable to existing Section 13 situations and the necessity for years of additional hearings investigating facts previously investigated and fully established.

The "dovetail" relationship existing between Sections 13 and 15a of the Interstate Commerce Act has already been commented upon in the briefs heretofore filed, and that relationship is admitted by *amicus curiae*. Ex Parte 148 was an attempt by the carriers, with the approval of the Interstate Commerce Commission, to raise the whole level of passenger fares to whatever extent the Interstate Commerce Commission had jurisdiction. That jurisdiction extended to all interstate fares and such intrastate fares as the Commission had had occasion to take over by virtue of Section 13 orders still outstanding. By its order in Ex Parte 148, applicable to passenger fares, the Commission exercised all the jurisdiction it had, and, instead of rewriting every individual Section 13 order it adopted the sensible course of decreeing that all those outstanding orders would be deemed amended only to the extent necessary to permit the 10% increase and that a copy of the amending order would be filed in the docket of each such Section 13 proceeding. In this expeditious manner the Commission in effect accomplished the same thing that it would have done if it had laboriously gotten out each existing Section 13 order and rewritten it by inserting the 10% higher requirement than that which had been put in originally. Its elec-

tion to accomplish the amendment in the manner that it did is nothing more than an efficient way of dispensing with a lot of unnecessary clerical work. The effect is to reaffirm and continue the original findings, save as altered by the addition of the same percentage to the intrastate as to the interstate fares, thereby preserving the relationship.

Considering the necessity for administrative tribunals functioning expeditiously in time of war, this case assumes an unusual importance. Here is an increase which the Interstate Commerce Commission has found is necessary to enable the railroads to render adequate and efficient railway transportation service during the present emergency. To put it into effect quickly, as the necessities of the situation demanded, the Commission entered a sweeping order of amendment to all outstanding orders (as *amicus curiae* admits; see top of page 23 of its brief), and thus left only for state action the residue of intrastate fares over which the Interstate Commerce Commission had not taken Section 13 jurisdiction. It will be remembered that in order to be in a position to exercise its broadest jurisdiction, the Interstate Commerce Commission had given notices to the states, as required by Section 13. Thus no jurisdictional impediment existed to the complete exercise by the Commission of its full powers. There is no reason why the notice thus given to the states in Ex Parte 148, being what the statute requires, should not be considered sufficient as part of a program to modify all outstanding orders of the Interstate Commerce Commission to the extent necessary to permit the increase so far as that Commission had jurisdiction. Such was the intent of the petition and the resulting order.

The notices to the states were not limited to a request for voluntary cooperation, as *amicus curiae* contends on pages 17 and 18 of its brief. At page 18 it quotes a recital from the report of the Commission that the cooperation of the

state commissions was sought, but omits to point out that the order of the Commission recites "that the proper authorities of all states have been notified of this proceeding" (R. 32), a complete compliance with the notification requirement of paragraph 3 of Section 13. Furthermore, the notification requirement of that section pertains to proceedings where there is brought in issue a fare "made or imposed by authority of any state." Since 1925 the Illinois intrastate commutation fares here involved have been maintained, not by any authority of the State of Illinois, but by a continuing order of the Interstate Commerce Commission. Granting that a notice to the state was necessary in the proceeding which led to the 1925 order, it is questionable whether any such notice was required in Ex Parte 148 in order to permit raising the level of the intrastate commutation fares to conform to that of the interstate commutation fares being raised at the same time. However, a notice was given, which, in any event, completely satisfies the requirement.

If *amicus curiae's* contention is sound, then each general revenue order (permitting a general increase or decrease in rates and fares) would automatically recreate and revive all Section 13 discriminatory situations previously corrected by the Interstate Commerce Commission. Further than this, it would automatically require re-trial of all discrimination cases under Section 3 of the Act involving the Commission's findings and orders previously made in hundreds of special, local and group rate structures. These same arguments of *amicus curiae* would make all such orders *functus officio* too. As the courts well know, the rates held and maintained by virtue of outstanding orders (under provisions of the Act other than Section 13) are numerous and cover large segments of the whole national rate structure. Giving effect to the contention of *amicus curiae*

would accomplish an almost complete frustration of the very purpose for which the Commission entered the 1942 order, and would produce the "administrative paralysis" referred to by Mr. Justice Brandeis in a footnote in the *New England Divisions Case*, 261 U. S. 184, at p. 198.

The Commission's reference, in Ex Parte 148, to the case of *Arizona Grocery Company* v. *Atchison, Topeka and Santa Fe Railway Company*, 284 U. S. 370, referred to on page 20 of the brief of *amicus curiae*, is nothing more than a routine protection against the possibility of future reparation claims in individual instances that might arise. There is no mention of the word "fares" in what the Commission there says, that being the word ordinarily used as to passenger charges. Note that, on page 612 of its opinion in Ex Parte 148 (248 I.C.C. 545) the Commission speaks of "passenger fares" and of "freight rates and charges," and of both as "rates, fares and charges." The Commission simply wanted to make it clear that in any freight reparation situation, such as that involved in the *Arizona Grocery Company Case*, it did not intend by its increase in a general-revenue case to preclude any shipper from asserting that an individual rate was unreasonable for the past as well as the future. This is but corollary and consonant to the Commission's reservation of jurisdiction to determine the lawfulness of particular rates or fares established pursuant to the Ex Parte 148 order—the so-called saving-clause (Appellee's Brief, 11, footnote 5).

IV.

Amicus Curiae's cases distinguished.

Arkansas Railroad Commission v. *Chicago, Rock Island and Pacific R. R. Co.*, 274 U. S. 597, simply holds that a previous Section 13 order does not of itself increase the intrastate rates again when the interstate rates go up. In

that case there was no such second order as we have here in Ex Parte 148. The *Arkansas* case would be parallel if in Ex Parte 148 the Interstate Commerce Commission had said nothing at all about amending the 1925 Section 13 order, either specifically or in general terms.

The case of *Georgia Public Service Commission* v. *United States*, 283 U. S. 765, in so far as applicable at all, supports rather than opposes appellee's position. It involved a direct attack on a Section 13 order of the Interstate Commerce Commission, which order was sustained. When the intrastate rates were ordered raised the level ordered was that of an interstate scale which had been found reasonable 18 months before. No new finding as to the interstate rates was made at the time the intrastate rates were ordered raised to their level. In the absence of any showing of changed conditions, the court held that any objection to the procedure was unfounded. The court construed the word "contemporaneously" in the Section 13 order as referring only to the rates in force at the time of the effective date of the original order. There is no such word in the 1925 commutation fares Section 13 order which we are discussing here and no reliance therefore is placed on it, since appellee relies not only on the original order issued in 1925 but on the subsequent modifying order issued in Ex Parte 148.

In *Board of Railroad Commissioners of North Dakota* v. *Great Northern Railway Company*, 281 U. S. 412, there had been an express vacation of the North Dakota section 13 order so as to permit North Dakota to resume its control over intrastate rates. Subsequently North Dakota ordered a reduction in intrastate rates below the interstate level. Without alleging confiscation (a fact which the court emphasized in its opinion), the railroads sought to enjoin the reduction pending action on a new Section 13 petition to

the Interstate Commerce Commission. It was held that under these circumstances an injunction should not issue to restrain enforcement of the lawfully established state rates pending Interstate Commerce Commission action. Manifestly the state rates were valid until a new Section 13 order could be procured, since the old order had been expressly vacated and no rates were being held or maintained thereunder. In our case, as has already been pointed out, the 1925 order still existed in full vigor at the time the amending order in Ex Parte 148 was issued, and the fares required by the 1925 order were being "held and maintained" by virtue of that order.

Atchison, Topeka and Santa Fe Ry. Co. v. *U. S.*, 284 U. S. 248, was a case which involved the grain rate structure of the railroads in the Western District of the United States (p. 254). The proceeding was instituted in 1925 and after extended hearings the record was closed in 1928. A second petition for rehearing "in the nature of a supplemental bill" (p. 256-260) was denied by the Commission in 1931. It set up the far-reaching change in economic conditions due to the tremendous impact of the 1929 collapse which had occurred between the hearings and the final disposition and alleged that the asserted important effect thereof upon the rate structure under investigation should be taken into consideration by the reception of additional testimony. That situation bears no resemblance to that which is now before the Court. We have here a simple case of relationship between interstate commutation fares and intrastate commutation fares in the same general territory, which is an unchanging thing (as distinguished from the level of the fares), and certainly may safely be assumed not to change unless and until the contrary is shown. No change is here alleged or claimed.

Amicus curiae seems, by implication at least, to be critical of the Attorney General of Illinois for having sub-

mitted this case on the pleadings. *Amicus curiae* should realize that no question of fact exists in this case and that it is not a direct attack on the Commission's order permitting of any examination of the evidence. In that situation, and the pleadings being complete as they were, the Attorney General very properly stood on his demurrer. It is not to be assumed that the officials of the State of Illinois were unfamiliar with the facts as to the transportation situation in Chicago and adjacent territory, or that New York officials are more familiar therewith.

V.

Confiscation stands admitted on this record.

Amicus curiae, though directing its argument largely to the Section 13 situation, in which it alleges a similar interest in New York, makes mention of appellee's point on confiscation, in which, so far as the brief shows, *amicus curiae* has no interest. *Amicus curiae* evidently realizes the great danger that exists from its point of view that this Court, whatever it does with Section 13 questions, cannot overlook the fact that the fares which the Illinois Commerce Commission sought to maintain are, on the face of the record, admittedly confiscatory. No question is here presented of bearing a burden of confiscatory rates during an administrative proceeding to determine whether or not the rates are confiscatory. It is here admitted that the rates fall short of providing enough revenue to meet the expense incurred in rendering the service, afford no return whatever upon the property devoted to the service, and are confiscatory (R. 14-15, 40-42, 50, 54, 56). Hence there was no need for either Commission or Court to "determine the value of the property attributable to the traffic in question or what would constitute a reasonable return thereon." *Banton* v. *Belt Line Ry.*, 268 U. S. 413, 424. And notwith-

standing the Illinois Commission's suspension order and proceeding, the appellee was "not bound to await final action by the Commission and * * * to serve in the meantime without just compensation." *Idem*, 417. In the situation here shown, regardless of all other considerations, this Court should continue the protection of appellee's constitutional rights, and permit the increased fares to remain effective.

CONCLUSION.

The order and decree appealed from should be affirmed.

Respectfully submitted,

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January 9, 1943.

FILE COPY

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APPELLEE'S REPLY TO BRIEF OF INTERSTATE COMMERCE COMMISSION, AMICUS CURIAE.

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March 4, 1943.

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APPELLEE'S REPLY TO BRIEF OF INTERSTATE COMMERCE COMMISSION, AMICUS CURIAE.

Appellee respectfully requests leave to present this reply to the Interstate Commerce Commission's brief *amicus curiae.*

The brief states (page 5) that "insofar as standard intrastate fares are concerned, the 1942 increase may well be mandatory as to fares covered by prior outstanding section 13 orders." A footnote to the sentence just quoted refers to the Montana fares, the Commission's action in which leaves no room for any other view. (See pp. 35 and 36 of our main brief and the Montana order appearing as an appendix thereto at pages 42-44, inclusive.) Clearly correct in that view, the Commission also correctly disposes of the erroneous contention of *amicus curiae*, City of New York, that the Commission's 1936 order had abrogated its prior section 13 orders (footnote 6, page 4, Commission's brief). And the Commission, like the Appellee, points out the entire consistency of the recital in the 1942 order with the Commission's action in ordering changes in intrastate fares which were being maintained or held by virtue of its outstanding orders.

The Commission fell into error only at the last minute. It says that, whereas its action on standard fares raised the section 13 intrastate fares to a point still below the ceiling previously found reasonable (3.6c per mile), that was not so as to these commutation fares, because a new ceiling would be necessary if the order applied to these Illinois intrastate commutation fares. In this the Commission overlooks its own action in having just found reasonable in that particular proceeding (*Ex Parte 148*, R. 32-34; *Increased Railway Rates, Fares, and Charges, 1942*, 248 I. C. C. 545, 564-566) and by the same order, the new ceiling established for Illinois-Wisconsin interstate commutation fares.[1] Here is the new ceiling of reasonableness at which the Illinois intrastate commuta-

[1] Interstate commutation fares were clearly included in the broad language "all fares," in the petition which was granted. There is no contention to the contrary.

tion fares of which the Commission had taken jurisdiction could and should be related to the interstate commutation fares. There was, therefore, a clear basis for maintaining by a single order the non-discriminatory relationship already established.

A separate and specific finding of reasonableness as to the intrastate rates was neither requisite nor appropriate. *United States* v. *Louisiana*, 290 U. S. 70, 75-80. In that case a section 13 order of the Commission was assailed as defective "because, in conforming the intrastate rates to the reasonable level of interstate rates, the Commission did not find specifically that in each case the rate as increased would be just and reasonable." This Court disposed of that contention by construing section 13 as follows (p. 78):

> "But we think that the relationship of the section to section 15a(2) already described is such that the standard of reasonableness prescribed by the latter is that necessarily set up for section 13(4) which supplements it. The considerations already detailed, which define that standard for section 15a necessarily define it for section 13(3) and (4), which creates a duty in 'dovetail' relationship to that imposed on the Commission by section 15a."

The petition of the railroads to the Interstate Commerce Commission for the increase (reproduced as Appendix E to the brief of *amicus curiae*, City of New York, pp. 55-61, inclusive), was couched in the broadest possible terms and covered all fares of which the Commission had jurisdiction. Nowhere was it limited to interstate fares. It said "all fares", with specific exceptions not material here. Naturally the petition did not apply to fares "made or imposed by the authority of any state" (the language of section 13 of the Interstate Commerce Act), but these

particular Illinois intrastate fares were not so made or imposed. They were made or imposed by an outstanding order of the Interstate Commerce Commission, and were being maintained by tariffs filed with the Interstate Commerce Commission. The prayer of the petition was "that the Commission enter a general order modifying all its outstanding orders to the extent necessary to enable petitioners to make effective the increases herein proposed." The Commission's order as to passenger fares was as broad on its face as the petition, and both were as broad as the power and jurisdiction of the Commission. A substantial body of rates still required state action, but not those of which this Commission had taken and was exercising a continuing jurisdiction.

Some confusion of thought has been brought into this case by failing to distinguish the term "intrastate fares" from the expression used in section 13 of the Interstate Commerce Act, "fare(s) * * * made or imposed by the authority of any state." The two things are not the same. When, as here in 1925, the intrastate fare is prescribed by the Commission, acting under the powers given in section 13, it ceases to be a fare "made or imposed by the authority of any state" and becomes one made or imposed by the authortiy of the Interstate Commerce Commission. The necessary jurisdictional findings once having been made (as here in 1925) and being of a continuing nature, the Commission can raise or lower the level in a general revenue case if, as here, that level is found reasonable, and at the same time preserve the nondiscriminatory relationship already established. No question of interference with state prerogatives is presented by this case. No rates made or imposed by state authority are involved and therefore the procedural steps of section 13 were not necessary at all. The Commission was

simply amending its own orders and raising its own rates.

The circumstance that standard fares were reduced subsequent to 1925, while these commutation fares were not, is unimportant in this case. The relationship of equality in Appellee's commutation rates prescribed for 1925 and the future was in no sense controlled by or related to the level of standard or line-haul passenger fares. The commutation passenger traffic in the Chicago suburban area, state and interstate, as shown by the 1925 report and order, is handled chiefly by local suburban trains rendering a complete service originating and terminating within the district and having no relation to the main line train movement. The conditions are essentially like those recognized by this Court with respect to freight rates covering switching movements within the Chicago switching district as "having no relation to line-haul movements." *Illinois Commerce Commission* v. *United States*, 292 U. S. 474, 477.

The Commission's previous findings that no conditions exist to justify intrastate commutation fares lower than the corresponding interstate commutation fares in Appellee's Chicago suburban area and that the two classes of traffic are "quite thoroughly mixed," make the following statements from the opinion in the Chicago switching rate case, above cited, (*Illinois Commerce Commission* v. *United States*, 292 U. S. 474, 483-485) of controlling importance here:

> "It is plain from the nature of the inquiry that the rate level, to which both classes of traffic were raised, was found reasonable on the basis of the traffic as a whole. Where the conditions under which interstate and intrastate traffic move are found to be substantially the same with respect to all factors bearing on the reasonableness of the rate, and the

two classes are shown to be intimately bound together, there is no occasion to deal with the reasonableness of the intrastate rates more specifically, or to separate intrastate and interstate costs and revenues.

* * * * * * *

The effect of maintaining a lower rate, intrastate, than the reasonable interstate rates is necessarily discriminatory wherever the two classes of traffic, inextricably intermingled, are carried on, as in the District, under substantially the same conditions."

The Commission's intent must be drawn from its order. It prescribed that "all outstanding orders * * * authorizing or prescribing interstate and intrastate fares * * * be and they are hereby modified * * * only to the extent necessary to permit the increase herein authorized to be added to the interstate and intrastate fares approved or prescribed in, or maintained or held by virtue of, said outstanding orders." Could anything be plainer? Then, as if to insure the effect as we claim it, the Commission required that a copy of its order be filed in the docket of each such proceeding, including certain section 13 proceedings, among which is the very section 13 proceeding in which was established the continuing relationship of these Illinois interstate and intrastate commutation fares.

Furthermore, orders such as this are not self-executing, but require filing of tariffs to make the rates effective. As this record shows (R. 10), after the Illinois Commission had attempted to suspend Appellee's tariffs, he filed with the Interstate Commerce Commission appropriate amendments to those tariffs, withdrawing all proposed increases in Illinois intrastate commutation fares except those on the classes of tickets being maintained by virtue of the 1925 Interstate Commerce Commission order, as amended by the 1942 order. This made it clear

that the Interstate Commerce Commission's orders, and only those orders, were being relied upon to justify the increase. The Interstate Commerce Commission did not suspend the tariff, as it has full power to do, either upon complaint or upon its own initiative without complaint,[1] but allowed it to go into effect.

CONCLUSION.

Realizing, as we do, the weight to be given to the views of a body of the standing and experience of the Interstate Commerce Commission, we submit, nevertheless, with all due deference, that the order of the Commission must be construed on the basis of what is found within its four corners; that the order as written was of the broadest possible sweep, as was the petition which it purported to grant; that the fares, never made or imposed by state authority since 1925, were as much subject to the control of the Commission as any other fares held or maintained by its orders, and that when, as part of a general revenue case, the Commission found reasonable a new ceiling as to interstate commutation fares, it had the right, and even the duty, to relate those intrastate fares to the interstate fares on that new-found level of reasonableness and thus prevent a reestablishment of the unlawful discrimination condemned by section 13.

The judgment of the District Court should be affirmed.

Respectfully submitted,

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Attorneys for Appellee.

March 1, 1943.

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[1] See Appendix A.

APPENDIX A.

Interstate Commerce Act, §15(7); 44 Stat. L. 1447.

"Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of

property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate, fare, or charge increased after January 1, 1910, or of a rate, fare, or charge sought to be increased after the passage of this Act, the burden of proof to show that the increased rate, fare, or charge, or proposed increased rate, fare, or charge, is just and reasonable shall be upon the carrier, and the commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible."

(29596)

SUPREME COURT, U. S.
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Supreme Court of the United States

No. 178. October Term, 1942.

ILLINOIS COMMERCE COMMISSION, JOHN D. BIGGS, WILLIAM PARRILLO, *et al.*,

Appellants,

against

CHARLES M. THOMSON, as Trustee of the Property of Chicago and North Western Railway Co.,

Appellee.

BRIEF OF *AMICUS CURIAE* IN SUPPORT OF REVERSAL.

Dated, New York, January 5, 1943.

William C. Chanler,
Corporation Counsel,
Attorney for the City of New York,
Amicus Curiae.

Herman Horowitz,
Murray Sendler,
of Counsel.

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Supreme Court of the United States

No. 178. October Term, 1942.

Illinois Commerce Commission, John D. Biggs, William Parrillo, *et al.*,
Appellants,

against

Charles M. Thomson, as Trustee of the Property of Chicago and North Western Railway Co.,
Appellee.

BRIEF OF *AMICUS CURIAE* IN SUPPORT OF REVERSAL.

This is an appeal from an order of the District Court, Northern District of Illinois, by which the appellants are enjoined from enforcing certain Illinois statutes, in disregard of which the appellee (hereinafter styled "the North Western") instituted increases in intrastate commutation fares. The Court below held that the general passenger-fare order of the Interstate Commerce Commission, made on January 21, 1942 in a nation-wide general revenue investigation, had the incidental effect of barring State authority, and of reviving in the Interstate Commerce Commission intrastate jurisdiction which it had exercised on October 6, 1925 for the purpose of correcting discrimination against interstate commerce then existing.

Preliminary Statement.

This record presents for consideration four orders of the Interstate Commerce Commission. Three of them are successive general revenue orders resulting from investigations pursuant to §15a of the Interstate Commerce Act[1] into the economic well-being of the nation's railroads. One of them was a discrimination order issued under §13(3) and (4) of the Interstate Commerce Act to implement a prior §15a order and to correct prejudice to interstate commerce resulting from the relation between the intrastate commutation rates of the North Western and the interstate fares prescribed by that prior §15a order.

The first §15a general revenue order was made on July 29, 1920 in *Ex parte* 74, *Increased Rates*, 58 I. C. C. 220. It "*required*" all interstate fares to be increased 20% and established a 3.6¢ minimum fare per mile for standard one-way interstate passenger transportation.

Thereafter, the Interstate Commerce Commission undertook discrimination investigations, in various States, pursuant to its authority under §13 of the Act, to correct prejudice to interstate commerce resulting from disparity between intrastate and interstate fares. A §13 order was issued in Illinois on October 6, 1925 in Docket No. 11703 (102 I. C. C. 479). It affected only the North Western, and "*required*" it to apply to its intrastate commutation rates

---

[1] "15a. Fair return for carriers.

(1) When used in this section the term 'rates' means rates, fares, and charges, and all classifications, regulations, and practices relating thereto.

(2) In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service, and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service."

the 20% increase which had been added to interstate fares on July 29, 1920 in *Ex parte* 74. The North Western obeyed, and the prejudice to interstate commerce was thus cured.

The second nation-wide §15a general revenue investigation resulted in an order of February 28, 1936 in Docket No. 26550 (*Passenger Fares and Surcharges*, 214 I. C. C. 174) and "*required*" the carriers to reduce their standard interstate one-way fares to 2¢ per mile as a maximum. This requirement was expressly confined to interstate fares. A direct result of this order, as declared by the Interstate Commerce Commission itself, was to terminate the §13 orders which had been issued to implement the §15a order of 1920, and thus to restore State authority. Among the orders so discharged was the 1925 §13 order in Docket No. 11703, by which the North Western's intrastate commutation fares had been correlated with the fare structure of *Ex parte* 74 (*infra*, pp. 25-30). The North Western maintained those commutation fares unchanged, although it reduced its standard interstate fares in compliance with the 1936 order (R. 9-10).

The third §15a general revenue investigation has precipitated this litigation. It resulted in the order of January 21, 1942 (*Ex parte* 148, *Increased Railway Rates, Fares and Charges*, 248 I. C. C. 545). Unlike its predecessors, the 1942 order did not "*require*" the carriers to do anything. It merely "*permitted*" a 10% fare increase in interstate commerce, as sought by the carriers. It expressly contemplated the normal exercise of State authority to permit corresponding increase of intrastate rates. In language vital to this case it recites that (R. 32)

> "similar application has been or will be made to the regulatory authority of the respective States for permission to increase similarly petitioners' intrastate rates, fares and charges; * * *"

And yet, this is the order by which, according to the Court below, (R. 55):

> "the Interstate Commerce Commission asserted and exercised its paramount and exclusive authority in the regulation of the passenger fares here involved, leaving the Illinois Commerce Commission without power to act with respect thereto."

The increased intrastate fares (which the Illinois Commerce Commission sought to suspend merely for investigation) were found by the Court below to be "the lawful existing fares" which the North Western was "required to collect" by force of the January 21, 1942 order, and without recourse to the Illinois Commerce Commission (R. 53).

The Issue and Its Importance.

(1)

This case presents a novel version of the established proposition that federal jurisdiction does not exist to regulate intrastate commerce except when necessary to the protection of interstate commerce from discrimination, prejudice or preference. Such federal intrastate jurisdiction heretofore has been recognized only as ancillary to some distinctly formulated pre-existing regulatory policy in the interstate field; and it has been available only after distinct and particular findings of discrimination or prejudice have been established. This Court has declared Interstate Commerce Act §13(3) and (4) to be ancillary to §15a, which is the basis of general revenue investigations. *Railroad Commission of Wisconsin* v. *C., B. & Q. R. R. Co.*, 257 U. S. 563, 586 (1922).

The Court below, however, attributed to the general revenue order of January 21, 1942, resulting from an investigation of the rates and fares throughout the country in their broadest aspect, the force of a §13 discrimination

order against State rates, construing it, by implication, as a direct requirement that the North Western alter its intrastate commutation fares.

Simply stated, the question here is whether that order, fairly construed, required the North Western to increase its intrastate rates in derogation of State authority; and if it did, whether it could be deemed valid in view of its origin in a §15a general revenue investigation, rather than a §13 discrimination proceeding.

(2)

The present case is one of general interest and importance as well as novelty. It is the first instance in which a general revenue order of the Interstate Commerce Commission has been accorded the force of a peremptory requirement that intrastate rates be changed. The relevant history of intrastate fare regulation in Illinois is paralleled in many other States, in one of which the questions here involved have been judicially considered already. They may well recur elsewhere.

The courts of New York, addressing themselves solely to the meaning of the order, found that it did not require change of intrastate fares in derogation of State authority. *Matter of Transit Commission* v. *Long Island Rail Road Co.*, 178 Misc. 290, 33 N. Y. Supp. (2d) 993, aff'd 265 App. Div. 847 (1st Dept., 1942; appeal to Court of Appeals pending).[2] In New York, the history of relevant Interstate Commerce Commission orders has been essentially the same as in Illinois; the single §13 discrimination order directing change of New York intrastate fares to harmonize them with the interstate fares resulting from *Ex parte* 74 was an order of November 13, 1920 in Docket No. 11623 (59 I. C. C. 290).

[2] The New York courts ruled that the validity of the order was a Federal, not a State question.

At the suggestion of the New York court, the New York railroads applied to the Interstate Commerce Commission for an express declaration that the order of January 21, 1942 required change of intrastate rates.[3] This application was denied.[4]

(3)

It is the purpose of the City of New York, in submitting this brief, to second the appellants' prayer for reversal upon the present record, the facts of which are the allegations of the complaint as admitted by demurrer. But if the Court do not reverse, it is our purpose to urge that the most that could be said upon the present record, for the North Western, concerning the meaning of the order, is that it is unclear; and that in such case the cause should be remitted with directions to permit full trial of the question whether the order can properly be construed to require change of intrastate rates without State sanction. Accordingly, we shall refer to the *Transit Commission* case as a demonstration that this question would probably be decided against the holding of the Court below, upon full proof of the utterances, actual practices and procedures of the Interstate Commerce Commission.

In support of this recommendation, which is peculiarly ours, we shall refer to matters of Interstate Commerce Commission history considered by the New York courts, which are of public record, but which, whether or not they are subject to judicial notice here, are not apparent upon the face of the present record.

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[3] *Cf. Arkansas Railroad Commission* v. *Chicago, R. I. & P. R. R. Co.*, 274 U. S. 597, 603 (1927).

[4] The order of the Interstate Commerce Commission denying this application is annexed hereto as "Appendix A", *infra*, p. 43. The *Transit Commission* case was reopened by the Court thereafter, and a supplemental opinion referring, *inter alia*, to this order, resulted. We annex the supplemental opinion as "Appendix B", *infra*, pp. 44-46.

Relation Between §15a General Revenue Orders and §13 Discrimination Orders of the Interstate Commerce Commission.

When the Interstate Commerce Commission launches upon a general revenue investigation, it complies with the mandate of Interstate Commerce Act §15a, requiring it to procure for the public adequate railroad service at reasonable rates with

> "due consideration • • • to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service."

The result of such an investigation, conducted upon a regional or national scale, is typically the determination that certain changes broadly applicable throughout the railroad industry may be or should be instituted, upon the ground that they conduce to the economic health of the industry as well as to the public convenience in the maintenance of the national transportation system. The orders of 1920, 1936 and 1942, to which we have referred, *supra*, pp. 2 to 4, are orders in general revenue investigations, each of which examined only into such matters as were of common interest to the carriers as the components of a national transportation system; and they made changes applicable in a correspondingly broad and general way.

Since the Interstate Commerce Commission has no general power to regulate intrastate commerce (Interstate Commerce Act, §1 [2a]), the Commission is given an exceptional intrastate jurisdiction only where it is necessary to protect interstate commerce from undue detriment which would otherwise result. Thus, §13(3) of the Act announces:

> "Whenever • • • there shall be brought in issue any rate, fare • • • or practice, made or imposed by authority of any State"

which (§13[4])

> "* * * causes any undue or unreasonable advantage, preference or prejudice as between * * * intrastate commerce on the one hand and interstate or foreign commerce on the other hand,"

the Interstate Commerce Commission

> "* * * shall prescribe the rate, fare * * * or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice or discrimination * * * the law of any State or the decision or order of any State authority to the contrary notwithstanding."

The 1925 order, by which the Interstate Commerce Commission brought the fares at bar into harmony with the general fare structure created in interstate commerce by *Ex parte* 74 in 1920, is a representative §13 discrimination order.

Section 15a orders may be mandatory or permissive as to interstate commerce, but, if they refer at all to intrastate rates, do so only suggestively or permissively. Every §13 order is directed solely to intrastate commerce, and is mandatory, not permissive. Thus, by the terms of the 1925 §13 order the North Western was "required to cease and desist" from engaging in specified discriminatory intrastate practices (R. 31).

The intrastate jurisdiction of the Interstate Commerce Commission under §13(3) and (4) is ancillary to its general jurisdiction over interstate commerce under §15a. In the words of this Court in *Railroad Commission of Wisconsin* v. *C., B. & Q. Railroad Co.*, 257 U. S. 563, 586 (1922),

> "Section 15a confers no power on the Commission to deal with intrastate rates. What is done under that section is to be done by the Commission 'in

> the exercise of its power to prescribe just and reasonable rates', *i. e.*, powers derived from previous amendments to the Interstate Commerce Act, which have never been construed or used to embrace the prescribing of intrastate rates. When we turn to paragraph 4, §13, however, and find the Commission for the first time vested with a direct power to remove 'any undue, unreasonable, or unjust discrimination against interstate or foreign commerce', it is impossible to escape the dovetail relation between that provision and the purpose of §15a."

This "dovetail relation" between §15a and §13 orders was apparently reversed by the Court below when it construed the general revenue order of 1942 as, in effect, a §13 discrimination order barring State jurisdiction. But until and unless a relevant rate structure has been brought into existence under the sanction of §15a, there exists no occasion for recourse by the Interstate Commerce Commission to §13. The whole reason for the existence of §13 is protection to some *pre-existing* scheme of regulatory policy, the standards of which are declared by §15a. Section 13 presupposes §15a; and a §13 order necessarily presupposes the existence of a system of interstate rates established under §15a.

Whereas the §13 discrimination order of 1925 was ancillary to the §15a order of 1920, the Court below undertook to make the general revenue order of 1942 ancillary to the §13 order of 1925.

No instance has been found in which the Interstate Commerce Commission made a discrimination order for the protection of interstate rates not actually in effect; and a §13 order outstanding for the protection of interstate commerce under a given rate structure becomes meaningless when a drastic revision of the interstate rate level takes place (*infra*, pp. 25-31, 34-37). In such a case the comparative basis of the §13 order ceases to exist, and the

question of prejudice to interstate commerce under the new general rate structure must be considered *de novo*.

Regulation of the North Western's Intrastate Commutation Fares in Illinois by the Interstate Commerce Commission.

The only §13 proceeding referred to in the record is that which resulted in the order of October 6, 1925. It followed the rules prescribed for this type of proceeding and exhibits all of the special characteristics associated therewith—a petition or complaint specifying with a high degree of particularity the discrimination complained of,[5] a mandatory notice to the State involved, accompanied by a copy of the complaint, a full hearing resulting in specific findings of discrimination as against pre-existing interstate fares, and a "cease and desist order" which must be obeyed "on or before" a fixed date.

While the petition in the 1925 §13 proceeding is merely referred to in the record (R. 31) without being set forth at length, both it and the notice to the State of Illinois[6] comply with §13 standards.

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[5] Interstate Commerce Commission Rules of Practice III(n) provide:

"[Complaints as to intrastate rates.] If the complaint brings in issue any rate, fare, charge, classification, regulation, or practice, made or imposed by authority of any State * * * as causing any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is forbidden and declared unlawful by section 13 of the act * * * facts should be stated with sufficient definiteness to disclose fully the contention made in respect of any tariff provision made or imposed by authority of any State * * *."

[6] Annexed hereto as "Appendix C" and "Appendix D" respectively, *infra*, pp. 47-52, 53-54. The North Western's representation before the Interstate Commerce Commission in 1925 included its principal counsel herein in the Court below (p. 52).

The 1925 §13 order is expressly predicated upon a "full investigation of the matters and things involved" (R. 31). Its supporting report explicitly refers to the (R. 30)

> "just and reasonable interstate fares and charges established and maintained by petitioner pursuant to the authority heretofore given by this commission in *Ex parte* 74 * * *."

This reference in the §13 discrimination order to the prior §15a general revenue proceeding which provides the basis of the comparison from which the conclusion of detriment to interstate commerce is drawn, is characteristic; and it illustrates the ancillary function of the §13 discrimination order to compel the cure of intrastate conditions harmful to interstate commerce as it has been organized for revenue production under §15a.

Ex parte 74 (58 I. C. C. 220) was a general revenue investigation in 1920 which increased interstate fares 20% and resulted in the fixation by the Interstate Commerce Commission of passenger fares upon the basis of a 3.6¢ minimum charge per mile for standard one-way transportation. It was the revenue anticipations of the North Western as predicated upon this 3.6¢ standard fare basis which the 1925 §13 discrimination order was intended to protect. In the service of that intention the 1925 order put the intrastate fares here involved in such a relationship to interstate fares as gave assurance to the Commission that this class of business would produce its due proportion of the North Western's entire revenue. The North Western had not increased its fares for this class of travel in 1920, when the order in *Ex parte* 74 took effect. Accordingly, the 1925 order "required" the North Western to increase these intrastate fares by 20%; but since they were commutation fares not referable to any single rate per mile, and materially lower

in general than fares for one-way transportation, the 1925 report and order expressly limited them to a maximum or ceiling of 2¢ per mile (R. 27, 31), below which they were to be in ratio to the North Western's customary descending scale. Thus the Commission determined that, if the intrastate commutation fares of the North Western were adjusted to scale down from a maximum of 2¢ a mile, they would be non-discriminatory as against an interstate fare structure built upon a 3.6¢ minimum for standard one-way travel (R. 22, 28).

The distinguishing characteristics of a §13 proceeding are evidenced in the following language of the 1925 order (R. 31):

> "*It is ordered*, That the Chicago & North Western Railway Company, * * * is hereby, notified and required to cease and desist from practicing the undue prejudice, undue preference and advantage, and unjust discrimination found in said supplemental report to exist, and to establish, put in force, and maintain multiple-trip and commutation fares for the transportation of passengers in intrastate commerce on said carrier's lines within the State of Illinois which shall be respectively higher by 20 per cent than those in effect on said lines and applicable to said transportation on August 25, 1920, subject to a maximum of 2 cents per mile."

And the order provided that it "shall become effective on or before November 23, 1925" (R. 31)—leaving virtually nothing to the carrier's discretion.

The only examination into the relationship between the North Western's intrastate commutation and its interstate fares ever made by the Interstate Commerce Commission was the §13 investigation resulting in the order of 1925.

The general revenue investigation of 1936 revolutionized standard interstate fares by abolishing the 3.6¢ *mini-*

mum and imposing a 2¢ *maximum* fare per mile. The North Western's intrastate commutation fares remained unchanged, however. In relation to basic interstate fares, they were thus greatly increased. *The increase approximated 80%.* This terminated the "dovetail relation" created in 1925, ended the existence of the 1925 discrimination order, and restored jurisdiction over these intrastate fares to the State of Illinois.

The investigation in *Ex parte* 148, the complaint concedes, was "a further nationwide general investigation" (R. 8). It did not consider, and could not have concerned itself with the North Western's intrastate commutation fares; the Interstate Commerce Commission neither intended nor had authority thus to revive the expired §13 order of 1925. An examination of each step throughout the entire *Ex parte* 148 proceeding will demonstrate that none of them met any of the conditions precedent to intrastate jurisdiction in the Interstate Commerce Commission.

Apart from these considerations, the regulation of commutation fares in the Chicago suburban zone presents peculiarly local problems which local authorities, because of greater familiarity, should be encouraged to pass upon in the first instance. This is obvious, and would amply warrant primary regulation by local authority, in any event. The action taken by the Illinois Commerce Commission in relation to the North Western's increased fares is not final; it has been mere suspension for purposes of investigation. Recourse to the Interstate Commerce Commission under §13 will still be available if the Illinois authority, after investigation, should reach a result prejudicial to interstate commerce.

Argument.

Our discussion will be developed under the following points:

I. The Court below erred in construing the general revenue order of January 21, 1942, rendered in a §15a proceeding, *Ex parte* 148, as requiring change of intrastate fares in derogation of State authority.

II. In *Ex parte* 148, a general revenue proceeding under §15a, the Interstate Commerce Commission had no power to order change of intrastate fares.

III. If the order appealed from be not reversed, the cause should be remanded with directions to permit the meaning of the order of January 21, 1942 to be determined upon evidence.

POINT I.

The Court below erred in construing the general revenue order of January 21, 1942, rendered in a §15a proceeding, *Ex parte* 148, as requiring change of intrastate fares in derogation of State authority.

The order of January 21, 1942, in its origin and upon the face of its recitals, could not warrantably be construed as an assertion of jurisdiction over the intrastate fares of the North Western; and such construction could not reasonably be developed out of any reference, express or implied, made in it to any prior order or action of the Interstate Commerce Commission. The Interstate Commerce Commission has already rejected such construction.

(1)

The order of January 21, 1942 did not result from a §13 proceeding, but from one which expressly contemplated normal State action on intrastate fares.

(a) The Initiating Petition in *Ex parte* 148.

The initiating petition in *Ex parte* 148 invoked only the interstate jurisdiction of the Interstate Commerce Commission. Witness the language of the Commission (Docket No. 28846, *Increases in Texas Rates, Fares and Charges*, ... I. C. C. ....., decided December 18, 1942):

> "The petition filed by the carriers with us on December 13, 1941, seeking increases in their rates, fares, and charges on *interstate traffic*, docketed as Ex Parte No. 148, was *so limited because of our jurisdiction* • • •." (Italics ours.)

The report in *Ex parte* 148 (248 I. C. C. 545, 549) characterized the railroads' plea thus offered as a prayer for

> "orders necessary to enable them to increase their rates, fares, and charges in *interstate or foreign commerce* • • •." (Italics ours.)

This initiating petition sought jurisdiction under but one section of the Interstate Commerce Act, namely, §15a, thus (Par. IV):[7]

> "Petitioners state that • • • the rates, fares, and charges under which they are now operating will not be adequate • • • to insure their ability to continue in the public interest the adequate and efficient service contemplated by §15a of the Act."

The railroads urged broadly that a general revenue increase was justified by general increases in the cost of labor, of

[7] For the convenience of the Court, this petition (which is partly paraphrased in the complaint) is annexed hereto as "Appendix E", *infra*, pp. 55-62.

materials and of protection to their property necessitated by the national emergency. All the allegations of the initiating petition were broad, general, and applicable to the railroad industry as a whole, rather than to any railroad, to any region or to any transportation function particularly.

The petitioning carriers did not put in issue the propriety or reasonableness of the relationship between intrastate rates, fares and charges on the one hand and interstate rates, fares and charges on the other hand, either of the carriers at large or of any railroad in particular. The carriers' petition was not intended as an invitation to the Interstate Commerce Commission to assert intrastate jurisdiction under §13(3) and (4). It uttered only the broadest generalities. It entailed none of the jurisdictional predicates of a discrimination inquiry under §13, and it complied with no part of the Commission's Rule III(n) (*supra*, p. 10, n. 5). It alleged no advantage, preference or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand; neither did it allege any undue or unjust discrimination against interstate or foreign commerce arising out of the relationship between interstate and intrastate rates, fares or charges.

Unlike a complaint against State rates, it omitted to request the Interstate Commerce Commission to "prescribe the rate, fare, or charge" so as to "remove such advantage, preference, prejudice, or discrimination" (§13[4]). It did not request action "the law of any State or the decision or order of any State authority to the contrary notwithstanding" (*ibid.*).

(b) The Notice of Hearing in *Ex parte* 148.

Upon the coming in of the carriers' petition for the investigation in *Ex parte* 148, the Interstate Commerce

Commission sent out a notice of hearings to be held.[8] This was the only notice given to any State. It made no reference to intrastate commerce, or to intrastate jurisdiction contemplated. Thus, neither the petition of the carriers as served upon the State authorities, nor the notice of hearing could reasonably have been construed as the institution of an investigation into State rates; §13 consequences could not have been anticipated, nor could they have resulted.

We invite comparison of the petition and notice of hearing in the 1925 §13 proceeding (Appendices C and D, *infra*, pp. 47-54), with the petition and notice of hearing in the general revenue investigation of 1942 (Appendices E and F, *infra*, pp. 55-63).

Section 13 of the Act, which is subdivided into four parts, treats of *all* kinds of complaints to, and investigations by, the Commission. However, in the parlance of commerce regulation, and in this brief, any unqualified reference to §13 (*e.g.*, "Thirteenth Section order") connotes Federal action in derogation of State authority. It was particularly unfortunate, in view of this customary connotation, for the brief of the North Western in the Court below (p. 4) to have described the notice of hearing given to the States in *Ex parte* 148 "as required by Section 13" —*innuendo*, that a discrimination inquiry had been begun.

Section 13 refers to *two* types of notice to States—the *voluntary*, which was actually given, and the *mandatory*, required when a State rate or regulation is under attack, which was not given. The notice actually given to the States in *Ex parte* 148 was given *voluntarily* pursuant to the statutory authority of the Interstate Commerce Commission "to avail itself of the cooperation, services, records, and facilities of such State authorities in the enforcement of any provision" of the Act (§13[3]). But the Act refers

[8] Annexed hereto as "Appendix F", *infra*, p. 63. In evidence in *Matter of Transit Commission* v. *Long Island Rail Road*, *supra*, p. 5.

particularly to the case of a discrimination investigation of State rates, saying that, when there is (*ibid.*)

> "brought in issue any rate, fare, charge, classification, regulation, or practice made, or imposed by authority of any State * * *, the Commission * * * shall cause the State or States interested to be notified * * *."

In other words, the Commission, at its own option, *may* invite State cooperation with *any* of its activities; but when proceeding under paragraph 4 of §13, the paragraph which obliges the Commission to cure discrimination resulting from State regulations, it *must* notify the State, the regulations of which have been challenged, to appear or default.

That the notice given to the States in *Ex parte* 148 was a mere invitation to voluntary cooperation and not the mandatory type of notice is shown by the language of the initiating petition of the carriers (Appendix E, *infra*, p. 61):

> "It is respectfully suggested, therefore, that the cooperation of the State commissions be invited * * *";

and by the report (248 I. C. C. 545, 549):

> "* * * we sought the cooperation of the State commissions."

(c) The Report and Findings in *Ex parte* 148.

The panoramic survey of general railroad revenue undertaken in *Ex parte* 148, and directed to the development of a *future* interstate rate level, could not have been a discrimination investigation looking toward the development of specific and particular findings of detriment to interstate commerce as organized under a revenue scheme not yet in existence, as such detriment might conjecturally

result from the fares of any carrier, or be sanctioned by the authority of a particular State.

The report says (248 I. C. C. 545, 607):

> "A nation-wide increase, chiefly on a percentage basis, is now proposed. * * * Obviously, there can be no detailed ironing out of inequalities in this proceeding."

Again at p. 609:

> "It would be desirable, if feasible, to consider the needs of the railways individually, and to adjust their respective schedules to meet their several needs. The exigencies of the case do not permit such refinement."

The report, upon which the passenger-fare order of January 21, 1942 is based was issued March 21, 1942. It contains not a single comparison between the facts of railroad operation intrastate and the facts of railroad operation interstate.[9] It contains no findings of discrimination, prejudice or undue burden or detriment to interstate commerce resulting from any fact or condition or circumstance of intrastate commerce. In the absence of such findings, the Interstate Commerce Commission could not be presumed to have directed this order to intrastate fares; and the Court below erred in holding to the contrary.

The silence of the report as to discrimination or undue burden or detriment to interstate commerce contrasts sharply with the express recitals of the report supporting the §13 discrimination order of October 6, 1925 (R. 19-31 at 30):

> "We find that * * * the maintenance of such intrastate fares and charges lower than the corresponding just and reasonable interstate fares and

[9] The portion of the report dealing with passenger fares is annexed to appellants' brief as "Appendix B".

> charges established and maintained by petitioner pursuant to * * * *Ex parte* 74 gives an undue preference and advantage to persons traveling in intrastate commerce * * * and unjustly discriminates against interstate commerce; which undue preference and prejudice and unjust discrimination should be removed.
>
> We further find that, to remove the undue preference and prejudice and unjust discrimination found to exist, petitioner should establish and maintain intrastate commutation passenger fares * * * which shall be respectively higher by 20 per cent than those in effect * * * on August 25, 1920, subject to a maximum of 2 cents per mile."

Those findings were clear and distinct, and conformed to the standards of particularity established by this Court. *Florida* v. *U. S.*, 282 U. S. 194 (1931); *cf. U. S.* v. *Louisiana*, 290 U. S. 70, 80 (1933).

Since §13(4) directs that the Interstate Commerce Commission, when it acts to correct discrimination resulting from state rates, fares or charges, "shall prescribe" the remedy, there is special significance in the following language from the conclusions of the Commission in *Ex parte* 148 (248 I. C. C. 545, 613):

> "Rates and charges increased as herein permitted are not prescribed rates and charges within the meaning of *Arizona Grocery Co.* v. *Atchison, T. & S. F. Ry. Co.*, 284 U. S. 370."

Rates and fares fixed for intrastate commerce by the Interstate Commerce Commission under §13 *must* be "*prescribed*"; whereas here we have a disclaimer that "prescribed" rates result from *Ex parte* 148. The quoted language is not to be deemed applicable to freight rates alone, for under §15a "the term 'rates' means rates, fares, and charges" (*supra*, p. 2, n. 1). Moreover, the same general

revenue investigation could not result in *prescribed* passenger fares in the intrastate field, but elective or optional freight and passenger rates and fares in the interstate field. It was the manifest purpose of the Interstate Commerce Commission to bring into existence an order so completely permissive in all of its terms and implications as to be wholly beyond the scope of judicial review, within the meaning of *Columbia Broadcasting System, Inc.* v. *U. S.*, 316 U. S. 407 (1942) and *U. S.* v. *Los Angeles & S. L. R. Co.*, 273 U. S. 299, 309-310 (1927), and the authorities therein cited.[10]

(d) The Recitals of the Order of January 21, 1942.

Notwithstanding all else in this case, the language of the order itself prohibits construction negativing State authority.

The order recites (R. 32) that

> "similar application has been or will be made to the regulatory authority of the respective States for permission to increase similarly petitioners' intrastate rates, fares, and charges;* * *."

It is thus predicated upon an expectancy that the various State commissions will in due course pass upon such applications. This is as clear an acknowledgment of State jurisdiction in the intrastate field as language can accomplish.[11]

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[10] This purpose was frankly avowed by the presiding Commissioner (Mr. Aitchison), who declared (S. M. A511K):

> "Of course, this case is one where we are not getting ready a record for the Court, you know, for Court review."

[11] Upon the record in *Ex parte* 148 the railroads' representative (Mr. Cleveland) uttered a prepared opening statement (S. M., pp. A 102 to A 120) concluding as follows (S. M., p. A 120):

> "We trust that the various State Commissions in their cooperative action with the Interstate Commerce Commission will give expeditious and favorable consideration to the corresponding petitions filed with them."

The order does not fix a date for change of fares, but merely declares that "the increased fares herein authorized may be made effective upon not less than 10 days' notice to the Commission * * *" (R. 34). The railroads thus control, each for itself, the date of change of fare pursuant to the order. Such change may be made at any time, provided 10 days' notice be given to the Interstate Commerce Commission. Change need not be made involuntarily. And the Commission contemplates future determination of "the lawfulness of any particular fare or fares, resulting from this order" (R. 34).

Notwithstanding the order's total lack of mandatory language the Court below gave it mandatory force by construing a *mention* in it of the §13 order of October 6, 1925 as a *re-enactment*, but "expressly modified" (R. 55). We postpone at this juncture our demonstration that the 1925 order had become *functus officio* (*infra*, pp. 25-31), to show that even if it were deemed in force in 1942, no arguable modification of it by the 1942 order could be more than permissive of change in intrastate fares. The very language of the 1942 order which "modified" prior orders does so "only to the extent necessary to permit the increase herein authorized to be added"—the increase is clearly not required to be added (R. 33). This language of permission contrasts vividly with the peremptory language of a §13 discrimination order, *e.g.*, that of October 6, 1925, which calls upon the North Western to "cease and desist from practicing the undue prejudice, undue preference and advantage, and unjust discrimination found * * * to exist, and to establish, put in force, and maintain" stated increases of fare "on or before November 23, 1925" (R. 31).

In 1942 the Commission intended only *not to oppose the wishes of the carriers*, as those wishes were expressed in applications to State and Federal regulatory authorities alike; it "permitted" the increases in interstate commerce,

and modified *all* outstanding rate orders—whatever their subject or nature—"but only to the extent necessary *to permit*" the change of general fare basis to be realized. In 1936, on the other hand, the Commission had unmistakably "*required*" change of interstate fares, while it "modified" in the intrastate field "to the extent only that may be necessary to permit" effectuation of the new general fare basis (*infra*, p. 29, n. 15; p. 65). The Commission itself distinguishes "permit" from "require". It knew in 1936 that the general revenue order of that year did not require change in intrastate fares which had been the subject of prior §13 discrimination orders (see p. 27 *infra*, n. 14); in the Court below the North Western conceded this, and the Court so found (R. 7, 51). Since the language of the 1936 order referable to intrastate fares was not a requirement of change, it was not a requirement of change when it was repeated in the 1942 order, *viz.*, "modified • • • only to the extent necessary to permit the increase • • •" (R. 33).

Although the North Western had signed the petition initiating *Ex parte* 148, it submitted no application respecting the fares in suit to the State of Illinois. Representative carriers did, however, apply to State authority as the order contemplated, *e. g.*, in Texas and in Rhode Island, for leave to make corresponding changes intrastate. Upon denial of such applications by the States, the carriers applied to the Interstate Commerce Commission for §13 relief, and upon proof of prejudice and detriment to interstate commerce, elicited orders requiring correction of the intrastate fares (Docket No. 28846, *Increases in Texas Rates, Fares and Charges*, ... I. C. C. ....., decided December 18, 1942; Docket No. 28827, *Rhode Island Commutation Fares*, 253 I. C. C. ....., decided September 8, 1942). The report of the Interstate Commerce Commission in the latter case, referring to the inception of *Ex parte* 148, and to the procedure followed by the carriers to procure permission of the State

authorities in the intrastate field as promptly as they could after securing Interstate Commerce Commission consent to the increased fares in the interstate field, stated:

> "By petitions duly filed with various State regulatory bodies, the carriers sought authority to increase their intrastate freight rates and passenger fares and charges corresponding to the increases authorized on interstate traffic, to become effective at the same time that the increased interstate rates and fares should become effective [*Ex parte* 148]."

Other representative carriers filed the "similar applications" to which the order of January 21, 1942 referred.[12]

No tenable construction of the order of January 21, 1942 can deny meaning to those of its parts which acknowledge State jurisdiction over intrastate fares; nor can any valid construction read out of the order the significance of its language giving each carrier control of the date when its rates and fares might be changed—language of permission.

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[12] In New York, such a "similar application" (by the New York Central, the Long Island and the Staten Island) was filed with the Transit Commission during the pendency of *Ex parte* 148. It acknowledged the force of New York State statutes corresponding to the Illinois statutes herein involved, and prayed for their suspension in the discretion of the Transit Commission thus:

"WHEREFORE, your Petitioners respectfully request that this Commission, in pursuance of the powers vested in it by the aforesaid Public Service Law, permit * * * without suspension * * * the same advances in all New York intrastate rates, fares and charges as shall be authorized or directed by the Interstate Commerce Commission [in *Ex parte* 148] * * * as to interstate rates, fares and charges * * *."

Another such application submitted to the Public Service Commission of New York by representative railroads for leave to increase commutation rates, offered as persuasive considerations the following:

"It is expected that intrastate passenger fares in all of the States in Official Classification Territory will likewise be increased on February 10th. *Most of the eastern States already have granted the necessary authority.* Likewise, under the authority of the respective State Commissions, the commutation fares in the important Philadelphia-Camden and Boston Metropolitan Districts will be increased by 10 per cent, effective February 10th." (Italics ours.)

Both of these utterances are in evidence in the New York case, *Matter of Transit Commission* v. *Long Island Rail Road, supra*, p. 5.

(2)

The §13 order of 1925 was superseded and rendered *functus officio* by the §15a order of 1936, and was not revived by the §15a order of 1942.

Unlike other carriers, the North Western did not file with the Illinois Commerce Commission the "similar application" contemplated by the order of January 21, 1942. Instead, it challenged the jurisdiction of the State Commission, asserting that, under color of the 1925 §13 discrimination order, the Interstate Commerce Commission had retained jurisdiction which it reasserted by the §15a order of 1942. This thesis was an essential element of the *ratio decidendi* below (R. 55):

> "The said order of January 21, 1942 expressly modified the previous order of the Interstate Commerce Commission entered in 1925 (Exhibit A attached to the complaint herein), by which the Interstate Commerce Commission had taken jurisdiction over the passenger fares involved in this suit, which jurisdiction it had thereafter retained."

The words of the 1942 order which the Court below found, at the suggestion of the North Western, to have breathed new life into an order when it was six years dead—"modified • • • only to the extent necessary to permit"—are the very same words by which it had died six years before. The North Western insisted below with equal vehemence that these talismanic words when used in 1936 had not availed to *decrease* its intrastate commutation fares, but when used in 1942 by the same authority and under the same auspices, amounted to a peremptory mandate requiring that those very fares be *increased*.

This dialectical virtuosity evoked the following startling declaration from the Court (R. 51):

> "On February 28, 1936, in a proceeding known as Docket No. 26550, Passenger Fares and Surcharges (214 I. C. C. 174), the Interstate Commerce

> Commission, in a further general and nation-wide investigation of railroad passenger fares, entered an order which, by specific reference to its above-mentioned previous order in Docket No. 11703, retained its continuing jurisdiction over the Illinois intrastate commutation passenger fares here involved, although the effect thereof was not to require any modification of said fares."

An essential error of the decision below is here isolated. If continuation of Illinois intrastate jurisdiction resulted from "specific reference" in the order of February 28, 1936 to Docket No. 11703, then "specific reference" *ibidem* to Docket No. 11764 (Appendix G, *infra*, p. 65) must, in the view of the Court below, have availed to continue Texas intrastate jurisdiction as asserted in 1921 in aid of the revenue basis of *Ex parte* 74 (*Intrastate Rates within the State of Texas*, 60 I. C. C. 421). Yet, in 1942 we find the Interstate Commerce Commission conducting a new §13 discrimination investigation in Texas, ancillary to *Ex parte* 148 (*Increases in Texas Rates, Fares, and Charges*, ... I. C. C. ....., decided December 18, 1942), and under a new docket number—28846 (*supra*, p. 23). This 1942 investigation would have been needless if the holding of the Court below were valid.

The 1925 §13 order by which the Interstate Commerce Commission exercised intrastate jurisdiction *ad hoc*, in a single instance and for a transitory purpose, had been completely discharged and effectively rescinded by the §15a general revenue order of February 28, 1936.[13] As we shall show, the courts (except the Court below), the Interstate Commerce Commission and the carriers themselves agree on this point.

What the order of February 28, 1936 did was to substitute for the 3.6¢ basic *minimum* one-way fare which had

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[13] The complaint below refers to this order (R. 7), which was judicially noticed (R. 50, 51). It is annexed hereto *in extenso* as "Appendix G" *infra*, pp. 64-66.

been in effect since 1920, a fare of 2¢ as a *maximum*. The order of October 6, 1925 had fixed fares in consonance with that 3.6¢ basic minimum. The order of October 6, 1925 plainly referred—as did the report on which it was based—to *Ex parte* 74, the §15a general revenue investigation establishing the 3.6¢ minimum basic rate (R. 30).

When the order of February 28, 1936 revolutionized basic fare levels and policy, *the North Western did not change its commutation fares.* The *ratio* or *relationship* formerly existing between the 2¢ maximum for commutation travel and the 3.6¢ minimum for one-way travel was ended. *Thereafter*, the ratio or relation between the commutation fares and the one-way fares of the North Western was not the creation of the Interstate Commerce Commission. The only ratio or relationship between those two classes of fares ever created by the Interstate Commerce Commission had been that in effect between 1925 and 1936 only; and that ratio or relationship has not existed at any time since. It was replaced by a purely adventitious one, which imposed a heavier burden of revenue production, proportionately, upon intrastate commerce than the Interstate Commerce Commission had imposed in 1925. By destroying this relationship, previously established by it, the Commission marked its own exit from the field of intrastate jurisdiction over the commutation fares of North Western in Illinois.

This the Commission did consciously.[14] In 1938, upon the occasion of an experimental modification upward of the

[14] On June 6, 1936, a communication of the Interstate Commerce Commission, referring to the Long Island Rail Road, (which, like the North Western, had been affected by a §13 discrimination order vindicative of the rate-structure of *Ex Parte* 74) said:

"At the time the Commission's order in Docket No. 11623 affecting the intrastate fares in New York State was made the intrastate basic fare was 3 cents, and that order operated to increase that fare to the interstate maximum for coaches of 3.6 cents. The recent general [1936] order in the passenger case modified that order to the extent necessary to permit the reduced fares to become effective. It thus

maximum fares which it had fixed for interstate commerce in 1936, the Commission expressed (*Ex parte* 123, 227 I. C. C. 685, 690)

> "hope that the respective State authorities can see their way clear to authorize a maximum coach fare of 2.5 cents to become effective on intrastate traffic at the same time and for the same period as herein authorized on interstate traffic."

In 1936, it was the clear understanding of the Interstate Commerce Commission that the effect of the order of February 28 upon prior §13 orders was to abrogate them, not only by destroying the pre-existing Commission-fixed relation of intrastate to interstate fares, but also by operation

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becomes apparent that there is nothing in the order in No. 11623 as so modified which precludes the Long Island Railroad Company from charging 3 cents per mile in coaches and in Pullman cars as it did prior to the effective date of that order.

* * * the Long Island Railroad Company is not bound by any order from this commission to apply the prescribed interstate bases on its intrastate traffic. This being true, jurisdiction over the intrastate fares maintained by that road now reposes in the State and local authorities."

This communication is annexed hereto as "Appendix H", *infra*, pp. 67-68. It appeared in evidence in *Matter of Transit Commission v. Long Island Rail Road Company*, *supra*, p. 5.

After this communication a proceeding was commenced to compel the Long Island Rail Road (owned by the Pennsylvania Railroad) to reduce its intrastate fares pursuant to New York statutes (Public Service Law, §§31-32; Railroad Law, §57a) forbidding a railroad to charge intrastate fares in New York State higher than those charged by its parent outside of New York State. This litigation (*Matter of Transit Commission v. Long Island Rail Road Company*, 248 App. Div. 749, aff'd 272 N. Y. 27 [1936]) provided ample opportunity for the argument to be offered—as it is here offered on behalf of the North Western—that a §13 order made before February 28, 1936 remained in force thereafter as a muniment of jurisdiction in the Interstate Commerce Commission and an ouster of State authority. And yet, *all* the litigants, and the Courts agreed that the order of February 28, 1936 discharged the prior §13 order and restored full State jurisdiction. The Appellate Division of the New York Supreme Court (*loc. cit.*) declared:

"Under the authority exercised by the Interstate Commerce Commission the defendant [Long Island Rail Road] has enjoyed for sixteen years a rate in excess of that fixed by the laws of this State. Now the power to fix rates as to this defendant has again become vested in the State and the existing laws are effective."

of law (*infra*, Point II). After 1936, it could not be revived —certainly not *ex parte*.

The pertinent recitals of both the 1936 and the 1942 orders[15] show that any argument characterizing the 1936 order as a requirement that intrastate fares be changed must be materially weaker when applied to the 1942 order. In the 1936 order, the §13 order in Docket No. 11703 with which we are here concerned is explicitly identified, and it is "modified * * * to the extent only that may be necessary to permit" the changes then instituted in general revenue basis to be, or to become, effective. On the other hand, the 1942 order mentions §13 proceedings only by reference to the recital of them in the 1936 order, and confines this reference within a clause which can hardly be construed as more than a direction for filing, in the docket of those proceedings as well as in the dockets of "outstanding orders."

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[15] *Order of February 28, 1936:*

"IT IS FURTHER ORDERED, That all outstanding section 13 orders, including those in dockets Nos. 11623, 11703, * * * 11920, affecting intrastate passenger fares or charges, which are inconsistent with the conclusions reached in the aforesaid report or with the requirements of this order be, and they are hereby, modified, effective concurrently with the establishment of the interstate bases herein authorized or prescribed, to the extent only that may be necessary to permit the bases of fares and charges herein prescribed or authorized to become effective or to continue in effect, as the case may be; and that a copy of this order be filed in the docket in each such proceeding."

Order of January 21, 1942:

"IT IS FURTHER ORDERED, That all outstanding orders, as amended, of the Commission, authorizing or prescribing interstate and intrastate fares, or bases of fares, be, and they are hereby, modified, effective concurrently with the establishment of the increased fares herein approved, only to the extent necessary to permit the increase herein authorized to be added to the interstate and intrastate fares approved or prescribed in, or maintained or held by virtue of, said outstanding orders; and that a copy of this order shall be filed in the docket of each such proceeding, including those proceedings under section 13 of the Interstate Commerce Act enumerated in the order of February 28, 1936, in docket No. 26550, *Passenger Fares and Surcharges.*"

If the 1925 §13 discrimination order had been outstanding in 1942, it would have been embraced in the words of the 1942 order by which "all outstanding orders" are "modified". But it is specifically mentioned *in a second co-ordinate clause, after* "all outstanding orders" have been accounted for. The only apparent reason for this separate mention (by reference to the category of dockets of superseded orders to which it belongs) is an intention to include those dockets in the direction for filing—a consequence which would have ensued automatically had these superseded orders been "outstanding orders".

This separate mention after "all outstanding orders" have been accounted for cannot be deemed merely repetition. The quoted words of the 1942 order, following the word "proceeding" in the second co-ordinate clause, would be misconstrued if so treated. As this Court said in *Ex parte The Public National Bank of New York*, 278 U. S. 101, 104 (1928):

> "No rule of statutory construction has been more definitely stated or more often repeated than the cardinal rule that 'significance and effect shall, if possible, be accorded to every word. As early as in Bacon's Abridgment, sect. 2, it was said that "a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence or word shall be superfluous, void or insignificant." ' *Market Co.* v. *Hoffman*, 101 U. S. 112, 115 [1880]."

The applicability here of this fundamental canon of construction of documents, thus phrased in relation to statutes, is especially appropriate in view of the exercise by the Interstate Commerce Commission of legislative power as a delegate of the Congress.

The most that could be said for the North Western's construction of the order of January 21, 1942 (with which

the Interstate Commerce Commission itself disagrees) is that, contemplating language which the Interstate Commerce Commission had uttered as a negation of all intention to prohibit the proposed increase of fares, it mistakenly perceived therein an assertion of jurisdiction to require the increase.

POINT II.

In *Ex parte* 148, a general revenue proceeding under §15a, the Interstate Commerce Commission had no power to order change of intrastate fares.

Here we assume *arguendo* that the order of January 21, 1942, has been properly construed to require the North Western to change its intrastate commutation rates; and we show that this assumption entails the imputation to the Interstate Commerce Commission of an intention to exercise intrastate jurisdiction which it could not constitutionally exercise.

We shall refer to four principles, all judicially established, and all, in our opinion, violated by the decision below.

1. The adjustment of a general rate level to the demands of a fair return appropriately precedes the determination of rates for particular services.

This requires the determination of a general revenue policy under §15a of the Interstate Commerce Act before any question can arise of bringing intrastate fares into harmony with that policy by force of §13(4) of the Act.

According to the North Western's theory, as it prevailed below, the order of January 21, 1942, having the primary character of a quasi-legislative general revenue order applicable alike to all railroads in interstate commerce, possessed, at the same time, the added character of a command

to increase the particular intrastate rates here involved, in derogation of State authority. This contention does violence to the principle by which this Court was recently guided in a case which involved no question of contingent jurisdiction to regulate: the fixation of a general level of rates or charges, so as to produce a fair return to the regulated industry, rationally precedes the determination of the rates and charges for particular services. In *Federal Power Commission* v. *Natural Gas Pipe Line Co.*, 315 U. S. 575 (1942), this Court considered provisions of the Natural Gas Act of 1938, which had been modeled on Interstate Commerce Act, §§13 and 15, remarking (p. 584):

> "The establishment of a rate for a regulated industry often involves two steps of different character, one of which may appropriately precede the other. The first is the adjustment of the general revenue level to the demands of a fair return. The second is the adjustment of a rate schedule conforming to that level so as to eliminate discriminations and unfairness from its details. Such an orderly procedure for establishing the rates prescribed by the Act would seem to be an appropriate means of carrying out its provisions."

In the case cited, the regulating commission had equal jurisdiction of the regulated industry, whether for the determination of a rate level conducive to a fair return, or for the elimination of discrimination and unfairness in detail. This Court approved the postponement in time of the latter type of regulation to the former. But where, as here, the regulating commission can have only a contingent jurisdiction in the particular field of regulation in detail, because that is intrastate commerce; and where its jurisdiction depends upon a comparison between the facts of interstate commerce and the facts of intrastate commerce,

the principle which this Court approved above as one of rationality becomes an inflexible constitutional limitation.

Accordingly, repeated references in the report of *Ex parte* 148 to the impossibility of "ironing out of inequalities" or meeting "the needs of the railways individually" (248 I. C. C. 545, 607, 609) do more than reflect the inadequacies of the record. They indicate limitations of the scope of the proceeding of which the Interstate Commerce Commission was clearly conscious; and they render it almost unnecessary to refer to the clear declaration which this Court made in *Railroad Commission of Wisconsin* v. *C., B. & Q. R. R. Co.*, 257 U. S. 563, 586 (1922), that

> "Section 15a confers no power on the Commission to deal with intrastate rates."

We have shown (*supra*, pp. 23-24) that the railroads of the country sought to gain State sanction for intrastate fare changes by applications which were generally contemporaneous with their petition to the Interstate Commerce Commission in *Ex parte* 148, inviting State action paralleling that which they anticipated from the Interstate Commerce Commission. Their object was to procure State consents as soon after the consent of the Interstate Commerce Commission as was practical. The virtual simultaneity of State and Federal relief thus sought by the railroads as a group, was not sought by the North Western. It made no application to the Illinois Commerce Commission; and that Commission is now disabled by the injunction of the Court below from determining that the North Western's new intrastate fares in Illinois are reasonable and permissible—which it might very well do.

2. Federal intrastate jurisdiction cannot exist except to protect and effectuate some established measure of regulation of interstate commerce.

The self-serving refusal of the North Western to submit its new fares to the scrutiny of Illinois authority should hardly be permitted to constitute an occasion for extending by implication the jurisdiction of the Interstate Commerce Commission into a field from which it is characteristically excluded. According to the North Western, the order of January 21, 1942 impliedly modified and re-established the §13 order of 1925 by which that carrier's intrastate fares had been put in due relation to an interstate fare structure which existed only between 1920 and 1936. It is essential to the North Western's theory to posit some survival of the order of 1925 after 1936. But this essential element cannot exist. An intrastate rate, established by a discrimination order which fixed it in relation to an interstate rate, does not vary with a subsequent variation of the interstate rate. Rather, it returns to the normal jurisdiction of the State authority, from which it had been removed for the exceptional purpose of correcting prejudice momentarily existing against interstate commerce.

In *Arkansas Railroad Commission* v. *Chicago, Rock Island and Pacific R. R. Co.*, 274 U. S. 597 (1927), a discrimination investigation resulted in a §13 order commanding the carrier to cease and desist from maintaining an Arkansas intrastate rate at a higher level than the interstate rate. This order was expressly made subject to the outcome of another pending investigation, having broader and more varied issues. The second investigation resulted in a change in the Arkansas interstate rate, but proposed no new intrastate rate; and the carrier sought to alter the Arkansas intrastate rate correspondingly, without procuring State sanction. Indicating the error of such proce-

dure, this Court held that, by altering the basis of comparison—the Arkansas interstate rate—the order in the second investigation wholly superseded the prior discrimination order, *viz.*, (p. 602):

> "There was no rescission in terms of the former order. But when the two orders are read together, as they must be, it is clear that the Commission construed its earlier order as requiring only that the Arkansas rates should not be lower than the interstate Memphis to Arkansas rates prescribed in that case, as long as they should be maintained."

Even where a discrimination order of the Interstate Commerce Commission relates the intrastate rate to the interstate rate "contemporaneously applicable", this Court has refused to countenance the argument that subsequent changes of interstate rate implied corresponding modifications of the §13 order, and consequent mandatory changes of the intrastate rate. *Georgia Public Service Commission* v. *United States*, 283 U. S. 765, 771 (1931).

In the case at bar, the §13 discrimination order of 1925 became discharged by operation of the general revenue order of February 28, 1936. In a parallel case, wherein the §13 discrimination order had been formally rescinded rather than discharged by operation of a subsequent order (*Board of Railroad Commissioners of North Dakota* v. *Great Northern Railway Co.*, 281 U. S. 412, 429 [1930]) this Court struck down an injunction restraining the State Commission from fixing intrastate rates pending the outcome of a current §13 discrimination investigation, saying (p. 430):

> "It is said that the interlocutory injunction, granted below, was in aid of the proceedings pending before the Interstate Commerce Commission. But the injunction necessarily has the effect of preventing the State from enforcing the rates it has

prescribed, which are lawful rates until the Interstate Commerce Commission finds that they cause an unjust discrimination against interstate commerce. A judicial restraint of the enforcement of intrastate rates, although limited to the pendency of proceedings before the Interstate Commerce Commission, is none the less essentially a restraint upon the power of the State to establish rates for its internal commerce, a power the exercise of which in prescribing rates otherwise valid is not subject to interference upon the sole ground of injury to interstate commerce, save as Congress has validly provided. Congress has so provided only in the event that, after full hearing in which the State authorities may participate, the Interstate Commerce Commission finds that unjust discrimination is created. Congress forbids the unjust discrimination through the fixing of intrastate rates but entrusts the appropriate enforcement of its prohibition primarily to its administrative agency.

It is urged that the restraining power of the Court is needed to prevent irreparable injury. But, in this class of cases, the questions whether there is injury, and what the measures shall be to prevent it, is committed for its solution preliminarily to the Interstate Commerce Commission."

3. Stale facts, rendered meaningless by subsequent change of circumstances, cannot support an administrative order.

The stale facts supporting a determination of prejudice and discrimination against interstate commerce by the North Western's intrastate commutation fares of 1925 cannot be availed of in 1942. This Court has held the Interstate Commerce Commission in error for maintaining in force, in the face of an application to reopen, an order issued in 1931 upon the basis of extensive evidence reflecting 1928 conditions—the error consisted in disregarding the judi-

cially-noticeable collapse of 1929. *Atchison, Topeka & Santa Fe Railway Co.* v. *U. S.*, 284 U. S. 248 (1932). In the case at bar, the error is greater, since the time span is greater and the economic vicissitudes have been more varied and extreme.

4. In controversy between State and Federal authority over the regulation of intrastate commerce, doubt is resolved in favor of the State.

In *Arkansas Railroad Commission* v. *Chicago, Rock Island & Pacific R. R. Co.*, 274 U. S. 597, 603 (1927), this Court announced a general principle which remains unquestioned:

> "The intention to interfere with the state function of regulating intrastate rates is not to be presumed. Where there is a serious doubt whether an order of the Interstate Commerce Commission extends to intrastate rates, the doubt should be resolved in favor of the state power. If, as the Railroad believed, the federal commission intended to include the intrastate Arkansas rates within its order, it should have taken action, through appropriate application, to remove the doubt by securing an expression by that commission of the intention so to do."

As we have shown, *supra* (p. 6) the order of January 21, 1942, has already been the subject of an "appropriate application" for "an expression by that Commission of the intention" to include "the intrastate [New York] rates within its order." In New York, as in Illinois, a single occasion had arisen, during the existence of the general revenue basis created by *Ex parte* 74 in 1920 for correction, by a §13 order, of State-sanctioned rates.

The Interstate Commmerce Commission refused to declare that the order of January 21, 1942 required the New York intrastate rates to be changed.

To the extent that the order of January 21, 1942 falls short of compliance with the statutory standards indicated by Interstate Commerce Act, §1(2a), §13(3) and (4), and §15a, as exemplified by the authorities given above, it transgresses the constitutional limitations imposed upon Congress in the regulation of interstate commerce. In *Board* v. *Great Northern Railway Co.* (*supra*, pp. 35-36), this Court reviewed the history of intrastate jurisdiction as asserted by the Interstate Commerce Commission in *The Minnesota Rate Cases* (230 U. S. 352 [1913]), and *The Shreveport Case* (234 U. S. 342 [1914]), finding that §13 (3) and (4) of the Interstate Commerce Act were a delegation to the Interstate Commerce Commission of full Congressional power, *viz.*, (281 U. S. 412, 426):

> "There can be no doubt that Congress thus intended to recognize and incorporate in legislative enactment the principle of the *Shreveport Case, supra.*"

In *The Shreveport Case*, 234 U. S. 342, 356 (1914), this Court had held that §3 of the Interstate Commerce Act as it then read was

> "certainly sweeping enough to embrace all the discriminations of the sort described which it was within the power of Congress to condemn."

These were (*id.*, pp. 355, 356):

> " 'to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever,

or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.' "

This is still the gravamen of §3; in the scheme of the Act as it reads since 1920, however, discriminations due to State authority (*The Shreveport Case*) are separately denounced in §13(4). Whenever the Interstate Commerce Commission, purporting to act under §3, or §13(4), exceeds its statutory jurisdiction, it goes beyond the constitutional limitation of the power of Congress itself.

Accordingly, if the Court below correctly declared the meaning and intent of the order of January 21, 1942, the Interstate Commerce Commission thereby asserted intrastate jurisdiction which had not been granted to Congress. Since such construction of the order would contravene the Constitution, it should be avoided. *Cf. Texas* v. *Eastern Texas R. R. Co.*, 258 U. S. 204, 217 (1922).

POINT III.

If the order appealed from be not reversed, the cause should be remanded with directions to permit the meaning of the order of January 21, 1942 to be determined upon evidence.

If this Court should reject the arguments in this cause in support of reversal and dismissal of the complaint, settled policy would amply justify it in refusing to permit the novel and important questions which have been raised herein to be determined upon a record which consists of little more than an incomplete set of pleadings. This policy is exemplified by the decision in *City of Hammond* v.

Schappi Bus Line, Inc., 275 U. S. 164, 171-172 (1927), directing that an injunction which the Circuit Court of Appeals had deemed permanent be treated as interlocutory, and (p. 172)

> "remanding the cause to the District Court for proceedings on final hearing, with liberty to that court, among other things, to allow amendment of the pleadings."

This was because (p. 171):

> "Before any of the questions suggested, which are both novel and of far-reaching importance, are passed upon by this court, the facts essential to their decision should be definitely found by the lower courts upon adequate evidence."

In the *Schappi* case, an answer had been interposed, and proof by affidavit had been received. Here there is no answer, and the facts of the record are only those which may fairly be deemed admitted by demurrer. We have not attempted to show which of the allegations of the complaint are well pleaded, and which are conclusions of law or otherwise objectionable. Limitations of space forbid such an analysis. But, considering the New York litigation a demonstration that some of the essential propositions relied upon by the Court below are at least open to grave question, the policy of the *Schappi* case becomes a particularly strong reason why this Court should be disinclined to affirm the present unqualified decision, from which strained inferences casting doubt upon heretofore unquestioned principles might be drawn.

As we have shown, the order of the Interstate Commerce Commission of January 21, 1942 was not, clearly upon its face, such a mandate as the Court below held

it to be. Extrinsic evidence of its meaning would be admissible.[15]

We feel that we cannot leave the subject of the infirmities of the present record which have not been developed by our argument, or by that of the appellant, without mentioning still other propositions upon which the Court below erroneously relied, *viz.*, that, if not increased, the intrastate commutation rates of the North Western would be non-compensatory and unreasonable (R. 15, 54, 56), and discriminatory under §13 (R. 9, 51). Such declarations transcend two distinct limitations upon the jurisdiction of the courts. The first is a limitation in favor of the primary jurisdiction of the Illinois Commerce Commission over such a question as the reasonableness of intrastate rates, and of the primary jurisdiction of the Interstate Commerce Commission over the question of discrimination. *The Minnesota Rate Cases*, 230 U. S. 352, 419, 420 (1913); see especially *Board of Railroad Commissioners of North Dakota* v. *Great Northern Railway Co.*, 281 U. S. 412, 420, 423, 426-427 (1930):

> "We find no basis for the conclusion that it was the purpose of Congress to interdict a state rate, otherwise lawfully established for transportation exclusively intrastate, before appropriate action by the Interstate Commerce Commission."

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[15] In its brief in the Court below (p. 9), the North Western referred to *New York* v. *United States*, 257 U. S. 591 (1922), as prohibiting extrinsic evidence where the validity of the order is collaterally attacked. But we are concerned, in this immediate context, with the meaning, not the validity, of an instrument unclear on its face; therefore any source, within or without the record in *Ex parte* 148, might yield relevant evidence. This was so in *Matter of Transit Commission* v. *Long Island Rail Road*, *supra*, p. 5; *cf. Porto Rico Sugar Co.* v. *Lorenzo*, 222 U. S. 481 (1912); 9 Wigmore, Evidence, (Rev. ed. 1940) §§2470, 2472.

The second limitation requir the federal equity courts, in the exercise of sound discretion, to defer to State authority, where, as here, that authority may yet preclude the litigation by satisfactorily resolving essential questions. *Railroad Commission of Texas* v. *Pullman Co.*, 312 U. S. 496, 500 (1941).

Conclusion.

The order and decree appealed from should be reversed and the complaint dismissed.

Dated, New York, January 5, 1943.

Respectfully submitted,

WILLIAM C. CHANLER,
Corporation Counsel,
Attorney for the City of New York,
Amicus Curiae.

HERMAN HOROWITZ,
MURRAY SENDLER,
of Counsel.

Appendix A.

Order

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 6th day of April, A. D. 1942.

EX PARTE No. 148

INCREASED RAILWAY RATES, FARES, AND CHARGES, 1942

Upon further consideration of the record in the above-entitled proceeding, and upon consideration of application of The Long Island Rail Road, The Staten Island Rapid Transit Railway Company and The New York Central Railroad Company, dated March 12, 1942, for clarification of the order of January 21, 1942, entered in the above-entitled proceeding, and of the replies to said application, and good cause appearing therefor:

It is ordered, That said application be, and it is hereby, denied.

By the Commission.

W. P. BARTEL,
Secretary.

(SEAL)

Appendix B.

Opinion on Motion to Reopen Case

107 New York Law Journal 1958, May 8, 1942.

By Mr. Justice Hofstadter.

Transit Comm'n and ano. v. *L. I. R. R. et al.*—

Upon the termination of the trial, this court found that it was impossible, on the record then before me to conclude that the order of the Interstate Commerce Commission of January 21, 1942, was intended by it to affect intrastate rates within the State of New York. To the contrary, the inferences naturally drawn from the language used by the Interstate Commerce Commission pointed in the direction that the matter of intrastate rates had been left to the state regulatory bodies. Mindful of a residuum of doubt, I then suggested that either side might apply to the Interstate Commerce Commission for a clarification of its order and that in the light of such clarification further proceedings might be had in this case to amend the decree then entered.

Acting on this suggestion, the petitioner [the railroads] initiated a proceeding before the Interstate Commerce Commission in the hope that a determination by the commission might resolve the indicated doubt in support of the petition. But that hope was not realized for the commission declined either to recognize the existence of any ambiguity in its order or to make further clarification if any such ambiguity existed. The only conclusion that can be drawn therefrom is that the commission did not wish in any way to interfere with or affect the decree of this court. There is nothing therefore in the proceedings before the commission or the denial of the application made to it which could possibly lead to a revision of my earlier determination.

The petitioner also points to certain proceedings which, since the entry of the decree in this case, have been had in connection with intrastate rates in the State of Montana.

Appendix B—(cont.).

While the exact nature of the proceedings there had does not appear from the documents now tendered by the petitioner, enough is produced to show clearly that the commission was there dealing not with a general clarification of its order of January 21, 1942, but with a special problem obtaining in the State of Montana. It is conceded that in the Montana case there exists no state regulatory body authorized to permit an increase of intrastate rates to conform with interstate rates, and that the absence of such state authority was made the basis of the application to the Interstate Commerce Commission by the Montana railroads. The Interstate Commerce Commission, on its part, responsive to the local situation there obtaining, made an explicit order granting the application there involved which, in the language of the petition there submitted, was for the purpose of expediting "the publication of the same rates intrastate in Montana as interstate." The proceedings in the Montana case, therefore likewise shed no light on the problem involved in the case before me.

The other matters proffered by the petitioner as a basis for reopening this case and reconsidering my earlier finding similarly are not persuasive. Without reiterating what I have previously said at some length, I need only add that nothing contained in the present petition or in the documents submitted therewith in any way affect the conclusions that I have heretofore reached. The importance of removing unjust burdens on interstate commerce by inadequate intrastate rates must naturally be a primary preoccupation of the Interstate Commerce Commission. Its unwillingness in the present instance to adopt the only course which would have certainly resulted in removing any such alleged burden can lead only to the conclusion that the commission itself is content to permit the matter of intrastate rates, in this instance at least, to be dealt with by the New York State regulatory bodies.

In dealing with the interpretation of administrative orders, of necessity courts must be governed by the precise

language employed in their promulgation. It would ill accord with the beneficent purposes of governmental regulation through administrative agencies, for the court to indulge in innuendoes and inferences designed to extend the scope of the commission's edicts beyond the natural implication of its words.

These proceedings will be opened only for the purpose of permitting the incorporation of the proffered exhibits into the record on behalf of the petitioner; otherwise this motion is in all other respects denied. Settle order on notice.

Appendix C.

BEFORE THE

INTERSTATE COMMERCE COMMISSION.

IN THE MATTER *of* INTRASTATE COMMUTATION FARES WITHIN THE STATE OF ILLINOIS.	Docket No. 11703.

Petition for Further Hearing.

To the Honorable the Interstate Commerce Commission:

Your petitioner, Chicago and North Western Railway Company, a party to the original petition in the above entitled proceeding, hereby respectfully petitions the Commission to reopen this proceeding in so far as it involves this petitioner's intrastate commutation passenger rates within the State of Illinois, and to hold a further hearing thereon. In support of this application your petitioner avers as follows:

I.

In an opinion bearing date of November 13, 1920, reported in 59 I. C. C. 350, the Interstate Commerce Commission rendered its opinion and entered its order in so much of this case as relates to passenger fares within the State of Illinois other than excursion, convention and other fares for special occasions, commutation and other multiple forms of tickets, extra fares on limited trains, and club car charges. It was stated in the opinion that fares

of this character not specifically passed upon would be reserved for further consideration. In accordance with this announcement, the Commission, by its order of December 2, 1920, assigned for hearing the matter of commutation fares within the State of Illinois. This phase of the case was heard at Chicago on December 18, 19 and 20, 1920, and at Washington on January 13, 1921. Briefs were filed, oral argument was had, and the case was submitted February 5, 1921, but has never been decided.

II.

That during all the time this case has been pending petitioner has been compelled to operate its intrastate commutation traffic on a basis of rates unduly preferential of intrastate traffic and of persons and localities within the State of Illinois, and unduly prejudicial to interstate traffic and to persons and localities outside said state, and unduly, unjustly and unreasonably to discriminate against interstate commerce.

III.

During all times mentioned herein your petitioner has published and still publishes interstate commutation passenger rates between points in Wisconsin and Illinois, under which rates there has been and is a substantial movement of traffic. The points between which such rates apply are as follows:

* * * * * * *

During all times mentioned herein petitioner has published and still publishes a number of intrastate commutation rates between Chicago, Illinois, and various Illinois stations too numerous to mention specifically herein but which are shown by the record. The majority of those rates apply to stations that are directly intermediate to the Wisconsin stations hereinbefore enumerated on movements to and from Chicago. A large volume of traffic has been and is moved under these rates, as hereinafter set forth.

Appendix C—(cont.).

IV.

Prior to the increase under *Ex Parte* 74, 58 I. C. C. 220, which became effective on interstate commutation passenger traffic August 26, 1920, there was a long established relationship between petitioner's interstate commutation rates, on the one hand, and its intrastate commutation rates in Illinois, on the other hand. The rates per mile were substantially the same interstate as for similar distances intrastate. Prior to August 26, 1920, the commutation rates, state and interstate, had always been changed together so as to preserve a nondiscriminatory adjustment as between intrastate and interstate commutation traffic. On the date last mentioned an increase of 20 per cent in the interstate commutation rates was put into effect as a result of *Ex Parte* 74, but there has been no corresponding increase in petitioner's intrastate commutation rates. The Illinois Commerce Commission, the body having charge of intrastate rates in Illinois, refused to allow petitioner to put into effect as to intrastate traffic the 20 per cent increase ordered in *Ex Parte* 74, notwithstanding petitioner's application therefor. As a result there exists a higher basis of interstate commutation rates than there is intrastate in Illinois, although the same trains carry both state and interstate passengers, who are accorded the same service. Undue preference is thereby given to intrastate passengers and localities within the State of Illinois, to the undue prejudice of interstate passengers and localities in the State of Wisconsin.

During the year 1924 petitioner's revenues from its Illinois intrastate commutation passenger traffic were $3,333,714.10. During the same year its revenues from its interstate commutation passenger traffic between the points named in Part III hereof were $237,979.06.

V.

Further discrimination against interstate commerce has been and is brought about by the fact that petitioner's inter-

state commutation rates have been and are being defeated by the purchase of intrastate commutation tickets between Chicago and Illinois points closest to the Wisconsin border combined with the use of local one way or roundtrip tickets from such border points to Wisconsin stations. The other interstate commutation fares can be and are being defeated by many interstate travelers where the combinations on such border points make less than the lawful through interstate commutation fares. This form of discrimination would be removed by the raising of the level of intrastate rates 20 per cent to that made effective on interstate rates August 26, 1920.

VI.

During each of the years 1920 to 1924, inclusive, petitioner has been compelled to operate its intrastate commutation passenger traffic in Illinois at a loss, due solely to the fact that the maximum rates it has been permitted to charge are unduly low. For the year 1924, which is fairly representative of any of the years 1920 to 1924, or of their average, the operating results of petitioner's Illinois intrastate commutation passenger traffic were as follows:

* * * * * * *

[Table omitted.]

The foregoing figures represent an operating loss. If consideration be given to the amount necessary to yield to petitioner the same percentage margin over operating cost, and taxes that all traffic yields, the revenue needs of petitioner are far greater than the amount of the operating deficit shown above. In 1924 the net operating income of your petitioner was 12.65 per cent of its total operating expenses, taxes and rentals. Its net return upon the value of its railway property held and used in the service of transportation was 3.31 per cent. If Illinois intrastate commutation traffic is to produce the same percentage of net return that all traffic of your petitioner averages, even though

that return is less than 5¾ per cent (the present rate of return fixed pursuant to the Transportation Act), it would require $1,883,103.43 of additional revenue, or 56.5 per cent increase in the present rates. The net operating income of the railroads of the United States as a whole was 19.75 per cent of their total operating expenses, taxes and rentals, and was less than 5¾ per cent return upon the aggregate value of their railway property held and used in the service of transportation. To produce the percentage of net return on petitioner's intrastate commutation passenger traffic that all traffic of the railroads of the United States as a whole produces, would require $2,230,214.50 of additional revenue, or 67 per cent increase in the present rates. The increase asked by petitioner in this proceeding is but 20 per cent and would supply only $666,742.82 on the basis of 1924 traffic, which would still be less than what petitioner should have to earn any return on its investment.

Petitioner alleges that its loss for 1925 on Illinois intrastate commutation passenger traffic, and for each succeeding year, will be as great as that in 1924 or greater, unless its rates are increased. In the absence of such an increase, this loss will fall upon other traffic, including interstate traffic, if petitioner is to earn a fair return upon its investment. Burdening interstate traffic with this loss constitutes an unlawful and unreasonable discrimination against interstate commerce.

VI. [*sic.*]

Petitioner is desirous of having this proceeding reopened for the taking of further evidence in order that it may show the facts hereinbefore set forth and prove that the undue prejudice, preference and discrimination upon which this proceeding was based still exist and have increased with each succeeding year since the hearing.

WHEREFORE, your petitioner prays that this proceeding in so far as it involves petitioner's intrastate com-

mutation passenger rates within the State of Illinois be reopened for the taking of further evidence. That after the taking of such evidence petitioner be allowed to file an additional brief herein and be heard in oral argument. That after such filing of briefs and oral argument the Commission enter an order declaring discriminatory, unjust and unlawful the present Illinois intrastate commutation passenger rates and any such rates less than 20 per cent more than the present rates, and prohibiting preferences and discriminations by requiring the establishment of intrastate commutation passenger rates in Illinois on the same level and basis as authorized by this Commission in *Ex Parte* 74, and prescribing rates, fares and charges or the maximum and minimum rates, fares and charges thereafter to be charged on Illinois intrastate commutation traffic. Petitioner prays for such other and further relief in the premises as to this Commission may seem right and proper.

Dated at Chicago, May 15, 1925.

R. N. Van Doren,
William T. Faricy,
Attorneys for Petitioner, Chicago and North Western Railway Company.

Fred W. Sargent,
Of Counsel.

Appendix D.

Order

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 1st day of June, A.D., 1925.

IN THE MATTER *of* INTRASTATE RATES WITHIN THE STATE OF ILLINOIS.	No. 11703.

Upon further consideration of the record in the above-entitled proceeding, and upon consideration of a petition filed therein, on May 15, 1925, by the Chicago & North Western Railway Company.

It is ordered, That the said proceeding be, and it is hereby, reopened for further hearing for the purpose of determining whether the commutation passenger fares of the said petitioner in effect between points on its line or lines in the State of Illinois are such as to cause any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce, on the one hand, and interstate or foreign commerce, on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce; and of determining what commutation passenger fares, if any, or what maximum or minimum, or what maximum and minimum, commutation passenger fares shall be prescribed to be charged and applied by said petitioner between points on its line or lines in said State in order to remove such advantage, preference, prejudice, or discrimination, if any, as may be found to exist.

Appendix D—(cont.).

It is further ordered, That the said proceeding be assigned for such further hearing at such times and places as the Commission shall hereafter designate.

And it is further ordered, That a copy of this order be served upon the said petitioner, upon the Governor of the said State, and upon the Illinois Commerce Commission, and that notice hereof be given the general public by posting a copy of this order in the office of the secretary of this commission at his office in Washington, D. C.

By the Commission:

GEORGE B. MCGINTY,
Secretary.

Appendix E.

BEFORE THE

INTERSTATE COMMERCE COMMISSION

Petition of Railroads for Authority to Increase Their Rates, Fares, and Charges.

The railroads listed in Appendix I hereto, hereinafter referred to as petitioners, being substantially all the Class I railroads of the United States and some railroads of other classifications, respectfully petition the Commission for authority immediately to increase their freight rates and charges and passenger fares in the manner and to the extent hereinafter set forth, and in support thereof show:

I

Petitioners state that they recently incurred certain unavoidable and continuing increases in their operating costs, which are so substantial that, unless promptly offset by increases in revenues, they will seriously impair the financial resources of petitioners and greatly endanger their ability to continue to render adequate and efficient railway transportation service on which the safety of our country now more than ever before depends.

II

Petitioners state that on December 1, 1941, pursuant to the procedure provided for in the Railway Labor Act (Act of May 20, 1936, 44 Stat. 577, as amended), they entered into mediation agreements with representatives of the great majority of their employees providing for certain increases in wages to be made effective retroactively for the period September 1 to November 30, 1941, and somewhat greater increases to become effective December 1, 1941. On the

Appendix F—(cont.).

basis of employment during 1941, and taking into consideration only the employees covered by said mediation agreements, the increases which became effective on the latter date will result in a total increase in wages for all Class I railroads of about $311,711,000 per year.

III

Petitioners state that in addition to the increases in wages resulting directly from said mediation agreements they will undoubtedly find it necessary to make certain readjustments in the wages of employees not covered thereby, which will result in further substantial increases in their operating costs, no accurate estimate of which can now be made, but which will probably be in excess of $20,000,000 per year.

There have also ben advances during the past few months in the prices of many of the materials and supplies used by petitioners, and it is reasonably to be expected that such increased prices will carry over into, and at least in many instances be enhanced in, the future. While petitioners are not able at this time to give an estimate of the amount by which their operating expenses will be increased as the result of such advances in prices, they do know, and accordingly allege, that such increase will be substantial.

Petitioners are also confronted with increases in their operating costs of not less than $30,000,000 per year as the result of certain precautionary measures which they are now taking upon recommendations of the War Department to safeguard their properties and operations during the continuance of the present war.

Also, as the result of the exigencies of the war in which our country is now engaged, petitioners are being called upon frequently to perform and are performing, in connection with the transportation of troops and property for the United States, many special and unusual services which add to the cost of such transportation but for which no compensation is included in the normal transportation

charges named in petitioners' tariffs and ordinarily assessed by them on such movements. The extent of such extraordinary services will undoubtedly increase greatly with the contemplated expansion of our defense efforts. While it is impossible to furnish at this time even an approximation of the amount by which the operating expenses of petitioners will be increased as the result of this situation, it is certain that the increase will be very substantial.

IV

Petitioners state that, in view of the increases in their operating costs referred to above, the rates, fares, and charges under which they are now operating will not be adequate to yield them sufficient revenue over and above their operating costs to insure their ability to continue in the public interest the adequate and efficient service contemplated by Section 15a of the Act. For the twelve months ended September 30, 1941, the Class I railroads had a net railway operating income of $990,217,910.* It is obviously impossible to state exactly what the net railway operating income would have been had the rates of pay for labor during that period been on the increased basis which became effective December 1, and had the other increased operating costs referred to in Section III hereof been in effect during that period. Petitioners are convinced, however, and therefore allege, that had such conditions existed the aggregate net railway operating income of Class I railroads for such period would have exceeded their fixed charges for the same period by only a relatively small amount and many of such railroads would not have earned their fixed charges. The fixed charges of all Class I railroads for that period were $625,785,000.

* This figure does not include any readjustment to take account of the wage increases effective retroactively for the month of September, 1941.

Appendix E—(cont.).

V

Petitioners set forth below a statement which shows for all Class I railroads in the United States, the net railway operating income and the net income or deficit after fixed charges for each of the calendar years 1926 to 1940, inclusive, and for the first nine months of 1941.

RAILWAYS OF CLASS I IN THE UNITED STATES

Year	*Net Railway Operating Income*	*Net Income After Fixed Charges and Contingent Interest*
1926	$1,213,089,966	$809,054,202
1927	1,067,985,495	672,899,809
1928	1,172,864,100	786,823,584
1929	1,251,697,938	896,806,611
1930	868,878,773	523,907,472
1931	525,627,852	134,761,911
1932	326,298,008	def. 139,203,821
1933	474,295,613	def. 5,862,836
1934	462,652,379	def. 16,887,078
1935	499,819,118	7,539,127
1936	667,347,115	164,630,041
1937	590,203,925	98,057,740
1938	372,873,771	def. 123,471,074
1939	588,829,083	93,181,534
1940	682,133,478	188,851,151
1941 (9 months)	753,339,880*	359,710,614*

* This figure does not include any readjustment to take account of the wage increases effective retroactively for the month of September, 1941.

VI

Petitioners state that the increased operating costs with which they are now confronted are general in character and apply to all traffic handled by them, and that to the extent that is reasonable and practicable all traffic should be required to contribute to the payment thereof. In view of the critical nature of the situation with which they are now confronted, the only practical method by which they may obtain the necessary added revenues is by a general percentage increase in all their rates, fares and charges, with

certain limitations and modifications in connection with particular classes of traffic. They accordingly propose and herein pray authority from the Commission to make increases in their rates, fares and charges, including international rates, fares and charges and with corresponding increases in their joint rail and water and rail and truck rates, fares and charges as follows:

PASSENGER

A uniform increase of 10 per cent in all fares, including rates and charges for milk and cream and articles grouped therewith as published in passenger tariffs, except that no increase will be made in fares specially published for application to members of the military or naval forces of the United States traveling on furlough, and no increase will be made in the amounts published as extra fares applicable in connection with particular trains.

FREIGHT

A uniform increase of 10 per cent in all freight rates, except those on the following commodities, which shall be increased as indicated below:

* * * * * * *

VII

Petitioners state that in their judgment increases in their rates, fares and charges in the manner and in the amounts hereinabove proposed by them will not result in rates, fares, or charges that are unreasonable for the services covered thereby and will not result in a loss of traffic by petitioners to an extent that will deprive them of benefit therefrom in the way of a substantial net increase in revenue. Petitioners further allege that said increases are necessary to enable them to continue to provide the adequate and efficient transportation service demanded in the interest of the general welfare and national defense.

Appendix E—(cont.).

VIII

Petitioners estimate, on the basis of traffic (both interstate and intrastate) moved during the past year and now moving, and taking into consideration such readjustments in the resulting rates as commercial and traffic conditions may require, that the proposed increases will result in increased revenue for all Class I railroads of about $356,956,000 per year.

IX

Petitioners present in Appendix III hereto a summary of the principal facts and considerations upon which they rely in support of the foregoing allegations of this petition.

Petitioners accordingly pray that they be permitted to increase their rates, fares, and charges to the extent and in the manner hereinbefore described; that the Commission institute promptly such an investigation as, in view of the critical nature of the situation now confronting petitioners, is necessary to enable it speedily to determine and find that their rates, fares, and charges, increased in the manner and to the extent proposed by them herein, will be just and reasonable and not in excess of such maximum reasonable rates, fares, and charges as are necessary in the public interest to enable petitioners to continue to provide the adequate and efficient railway transportation service contemplated by law and required by the present national emergency; that the Commission grant petitioners special permission to make such increases effective by publication, on one day's notice, of simple forms of supplements to existing schedules, and that such supplements be permitted to become effective without suspension; that the Commission enter a general order modifying all its outstanding orders to the extent necessary to enable petitioners to make effective the increases herein proposed; and that where the

application of the increases herein proposed would result in creating new departures or changing existing departures from Section 4 of the Act the Commission by the entry of special orders authorize such departures.

Petitioners state that the increased operating costs hereinbefore referred to are being and will be incurred by them in the handling of intrastate, as well as interstate, traffic and that the estimate of increased revenues which petitioners will receive, as set forth in Paragraph VIII hereof, reflects the application of the proposed increases in rates, fares, and charges to intrastate traffic. It is respectfully suggested, therefore, that the cooperation of the State commissions be invited, as provided by law, in any investigation instituted and conducted by the Commission as herein prayed for.

Respectfully submitted,

R. V. Fletcher
J. Carter Fort
J. M. Souby
J. R. Bell
H. D. Boynton
E. H. Burgess
Elmer B. Collins
Frank [illegible]. Gwathmey
T. P. Healy
H. H. Larimore
Walter McFarland
W. N. McGehee
W. A. Northcutt
Guernsey Orcutt
R. S. Outlaw
Elmer A. Smith
Carson L. Taylor
H. L. Walker
Charles R. Webber
Attorneys for Petitioners.

Dated at Washington, D. C.,
December 13, 1941.

Appendix E—(cont.).

The following Appendices to Appendix E are not reproduced:

Appendix I.

[This contains the names of 352 railroads which were the petitioners.]

Appendix II.

[Rules for disposition of fractions.]

Appendix III.

[This appendix consists of five exhibits summarizing operations, etc. of Class I rail carriers.]

Appendix F.

INTERSTATE COMMERCE COMMISSION
WASHINGTON

December 18, 1941.

EX PARTE NO. 148.

INCREASED RAILWAY RATES, FARES, AND CHARGES, 1942.

IN THE MATTER
of
THE PETITION OF RAILROADS TO INCREASE THEIR RATES, FARES, AND CHARGES.

The above-entitled proceeding is assigned for hearing at Hotel Morrison, Chicago, Illinois, before Commissioners Aitchison, Mahaffie, and Splawn, January 5, 1942, at 10:00 o'clock a. m.

Oral argument before the Commission at its offices in Washington will be held as soon after the conclusion of the oral testimony as possible, beginning at a date to be announced at the conclusion of the oral hearing. Briefs and written arguments will not be expected.

Attention is called to the appendix hereto, which contains special instructions and rules of procedure to be followed by parties who may appear herein.

By the Commission.

W. P. BARTEL,
Secretary.

[The "appendix hereto" consisted entirely of rules and recommended practice for the style, preparation and presentation of proof and argument; all drawn largely from the Commission's Rules XIII and XXI.]

Appendix G.

Order.

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 28th day of February, A. D. 1936

No. 26550

Passenger Fares and Surcharges

IT APPEARING, That by order dated June 4, 1934, the Commission entered upon an investigation into the lawfulness of the passenger fares and Pullman surcharges maintained by all common carriers by railroad in the United States subject to its jurisdiction, for the purpose of determining what fares and charges, or what maximum or minimum or maximum and minimum fares and charges, should be prescribed to be charged in order to remove any unlawfulness in such fares and charges which might be found to exist; and that all railroads within the continental United States subject to the Commission's jurisdiction were made respondents in said proceedings;

IT FURTHER APPEARING, That a full investigation of the matters and things involved has been had, and that the Commission, on the date hereof, has made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

IT IS ORDERED, That the respondents herein, according as they participate in the transportation, be, and they are hereby, notified and required to cease and desist, on or before June 2, 1936, from publishing, demanding, or collecting (1) any Pullman surcharge as described in said report, and (2) any fares or charges for the transportation of passengers in standard equipment which exceed those on the bases hereinafter prescribed.

Appendix G—(cont.).

IT IS FURTHER ORDERED, That said respondents, according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before June 2, 1936, and thereafter to maintain and apply to the interstate transportation of passengers in standard equipment, fares which shall not exceed 2 cents per passenger-mile, one way and round-trip, in coaches, and 3 cents per passenger-mile, one way and round-trip, in Pullman cars; provided (1) that reasonable extra fares, in addition to the regular passenger fares and Pullman charges for space, may be charged for passenger service which is definitely superior to that generally furnished, upon the condition that reasonably prompt and comfortable regular through service without extra fare be available to the public at hours which are substantially as convenient as those at which the extra-fare service is operated; (2) that the Pullman or coach fares, or both, at present maintained on the lines of the several respondents as outlined in the said report under the heading "Exceptions to the General Basis" may be continued in effect, but may not be exceeded without our approval; (3) that the practice, to the extent engaged in at present, of adding to the passenger fares special charges for transportation over certain bridges and ferries, or through long and exceptionally expensive tunnels, may be continued in connection with the maximum fare bases herein prescribed; and (4) that in publishing fares in compliance herewith a minimum charge of 10 cents for all classes of equipment may be observed, and sufficient may be added to the fares resulting under the bases herein prescribed so that all of them will end in 0 or 5.

IT IS FURTHER ORDERED, That all outstanding section 13 orders, including those in dockets nos. 11623, 11703, 11761, 11762, 11763, 11764, 11774, 11775, 11776, 11828, 11829, 11830, 11831, 11863, 11894, 12085, 12092, 12123, 12694, 13412, 14789, and 19920, affecting intrastate passenger

fares or charges, which are inconsistent with the conclusions reached in the aforesaid report or with the requirements of this order be, and they are hereby, modified, effective concurrently with the establishment of the interstate bases herein authorized or prescribed, to the extent only that may be necessary to permit the bases of fares and charges herein prescribed or authorized to become effective or to continue in effect, as the case may be; and that a copy of this order be filed in the docket in each such proceeding.

And it is further ordered, That this order shall continue in force until the further order of the Commission.

By the Commission.

George B. McGinty,
Secretary.

(seal)

Appendix H

INTERSTATE COMMERCE COMMISSION

Washington

June 6, 1936.

Offices of CLAUDE R. PORTER
Commissioner

Mr. Paul Windels,
Corporation Counsel,
Municipal Building,
New York, N. Y.

Dear Sir:

Your letter of May 29th with reference to the advertisement of the Long Island Railroad Company transmitted therewith, setting forth its intention to charge coach fares for intrastate traffic on a higher level than the maximum of 2 cents per mile prescribed by the Commission for interstate travel, has been referred to me for reply.

At the time the Commission's order in Docket No. 11623 affecting the intrastate fares in New York State was made the intrastate basic fare was 3 cents, and that order operated to increase that fare to the interstate maximum for coaches of 3.6 cents. The recent general order in the passenger case modified that order to the extent necessary to permit the reduced fares to become effective. It thus becomes apparent that there is nothing in the order in No. 11623 as so modified which precludes the Long Island Railroad Company from charging 3 cents per mile in coaches and in Pullman cars as it did prior to the effective date of that order.

While it is true that the passenger case was tried from beginning to end upon the theory that the maximum bases therein prescribed were to be applied intrastate as well as interstate, technically the Long Island Railroad Com-

Appendix H—(cont.).

pany is not bound by any order from this Commission to apply the prescribed interstate bases on its intrastate traffic. This being true, jurisdiction over the intrastate fares maintained by that road now reposes in the State and local authorities.

Yours very truly,

CLAUDE R. PORTER
Commissioner.

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CLERK

No. 178

In the Supreme Court of the United States

OCTOBER TERM, 1942

ILLINOIS COMMERCE COMMISSION, ET AL., APPELLANTS

v.

CHARLES M. THOMSON, AS TRUSTEE OF THE PROPERTY OF CHICAGO AND NORTH WESTERN RAILWAY COMPANY

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF ON BEHALF OF THE INTERSTATE COMMERCE COMMISSION, AMICUS CURIAE

CITATIONS

Cases:	Page
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Wisconsin Passenger Fares, 59 I. C. C. 391	2
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813007—43

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v.

CHARLES M. THOMSON, AS TRUSTEE OF THE PROPERTY OF CHICAGO AND NORTH WESTERN RAILWAY COMPANY

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF ON BEHALF OF THE INTERSTATE COMMERCE COMMISSION, AMICUS CURIAE

This brief is filed pursuant to the request of the Court, conveyed in the Clerk's letter of January 19, 1943, to the Solicitor General, for "a brief on behalf of the Interstate Commerce Commission on the meaning and application of the Commission's order, Ex Parte No. 148 of January 21, 1942, and on the sufficiency of the Commission's findings to support it."[1]

[1] Ex Parte No. 148 has been reopened by the Commission to consider whether all or any of the increases there authorized should be allowed to stand. If the Commission should decide that question in the negative as to all the increases, or if not all, as to the increases in commutation fares, in-

In 1920 the Interstate Commerce Commission authorized a general increase of 20 per cent in passenger fares, including commutation fares. As a result, the interstate standard fare throughout the country became 3.6 cents a mile.[2] *Increased Rates, 1920,* 58 I. C. C. 220 and 302. A similar increase of 20 per cent in intrastate standard fares was authorized by most of the state commissions, but there were several that refused their sanction. Thereupon, the carriers instituted proceedings before the Interstate Commerce Commission under Section 13 (3) and (4) of the Interstate Commerce Act. In each instance the Commission, after appropriate proceedings, entered an order requiring a 20 per cent increase in the intrastate fares to bring them up to the level of the increased interstate fares.[3]

---

cluding those here involved, the question would arise as to whether this case had become moot.

[2] In 1918, by a general order of the Director General of Railroads, the basic passenger fare throughout the country on both interstate and intrastate travel had been fixed at 3 cents a mile. See *Intrastate Rates within Illinois*, 59 I. C. C. 350, 353; *Passenger Fares and Surcharges*, 214 I. C. C. 174, 186.

[3] Among such proceedings were *Intrastate Rates within Illinois*, Docket No. 11703, 59 I. C. C. 350 (1920); *Wisconsin Passenger Fares*, Docket No. 11763, 59 I. C. C. 391 (1920); *Rates, Fares, and Charges of N. Y. C. R. R. Co.*, Docket No. 11623, 59 I. C. C. 290 (1920); *Intrastate Rates within the State of Texas*, Docket No. 11764, 60 I. C. C. 421 (1921). The Wisconsin and New York orders were sustained by this Court in *Wisconsin R. R. Comm.* v. *C., B. & Q. R. R. Co.*, 257 U. S. 563 and *New York* v. *United States*, 257 U. S. 591. The orders in the other cases were not attacked.

Although interstate commutation fares had been raised 20%, as a result of the 1920 proceeding, these Section 13 orders did not apply to intrastate commutation fares. Separate proceedings were brought with respect to such fares,* and in October, 1925, the Commission entered an order that, to avoid discrimination against interstate commerce, the Illinois intrastate commutation fares charged by the Chicago & North Western should likewise be increased 20%, subject to a maximum of two cents a mile. *Intrastate Rates within Illinois,* 102 I. C. C. 479 (quoted at R. 19–31).

The next pertinent Commission order was entered in 1936. At that time, in order to increase rail revenues by bringing passengers back to the railroads, the Commission reduced maximum standard Pullman fares to three cents a mile and coach fares to two cents a mile. *Passenger Fares and Surcharges,* 214 I. C. C. 174. In order to prevent intrastate fares in states subjected to the earlier Section 13 orders from being higher than the new interstate maximum fares, the Commission ordered that "All outstanding section 13 orders * * * inconsistent with the conclusions herein reached will be modified" to the extent

* E. g., *Intrastate Passenger Fares of the Chicago, Lake Shore & South Bend Railway Company between Points in Indiana,* 69 I. C. C. 180; *Intrastate Rates within Illinois,* 77 I. C. C. 173; *Intrastate Rates within Illinois,* 102 I. C. C. 479.

necessary to permit the new fares to become effective. 214 I. C. C. at 257.[5]

This report and order did not affect commutation fares. On the Chicago & North Western such fares had previously been no greater than two cents a mile. But it did apply to the intrastate standard fares previously subjected to other Section 13 orders.[6]

In the proceeding involved in the present case, culminating in the 1942 order here in question, the Commission authorized a general 10% rise in passenger fares because of increases in wage levels, the costs of materials and supplies, and other emergency expenditures. Ex Parte No. 148 (R. 32–35); *Increased Railway Rates, Fares, and Charges, 1942*, 248 I. C. C. 545, 564–566. The sec-

[5] The wording of this part of that order is as follows:

"*It is further ordered*, That all outstanding section 13 orders, including those in dockets nos. 11623, 11703, 11761, 11762, 11763, 11764, 11774, 11775, 11776, 11828, 11829, 11830, 11831, 11863, 11894, 12085, 12092, 12123, 12694, 13412, 14789, and 19920, affecting intrastate passenger fares or charges, which are inconsistent with the conclusions reached in the aforesaid report or with the requirements of this order be, and they are hereby, modified, effective concurrently with the establishment of the interstate bases herein authorized or prescribed, to the extent only that may be necessary to permit the bases of fares and charges herein prescribed or authorized to become effective or to continue in effect, as the case may be; and that a copy of this order be filed in the docket in each such proceeding."

[6] The Commission does not regard the 1936 order as having abrogated the prior Section 13 orders. The argument of *amicus curiae* to that effect is contrary to the language of the order.

ond paragraph of this order modified all outstanding orders with respect to interstate and intrastate fares to the extent necessary to permit the general increase authorized (R. 33). The Commission made no special findings as to the relationship between interstate and intrastate fares.

Insofar as *standard* intrastate fares are concerned, the 1942 increase may well be mandatory as to fares covered by prior outstanding Section 13 orders.[7] Such fares had validly been fixed at 3.6 cents a mile in 1920. *Wisconsin R. R. Comm.* v. *C., B. & Q. R. R. Co.*, 257 U. S. 563; *New York* v. *United States*, 257 U. S. 591. In the 1936 proceeding, they were reduced to the level of two cents a mile for coach fares and three cents for Pullman. The 1942 order raised them only to 2.2 cents and 3.3 cents, respectively, well within the maximum prescribed for intrastate fares by the 1920 Section 13 proceedings.[8]

The situation is different as to the commutation fares involved in this case. Those fares were established in 1925, but were not reduced between 1925 and 1942. As a result, the 10 percent general increase authorized in 1942 would raise those

[7] The fares involved in the *Montana* and *New York* cases relied upon by the parties fall into this category. The New York case is now pending in the New York Court of Appeals, and may ultimately reach this Court.

[8] Many of the state commissions have apparently interpreted the order as mandatory as to standard fares and permitted the 10% increase notwithstanding state laws prescribing lower maximum standard fares.

fares above the level justified by the findings in the original Section 13 proceeding. The 1942 increase in commutation rates is thus not within the scope of the earlier order and findings.

It is true that the need for equivalence as between inter- and intra-state fares has probably not changed since 1925. But, as the report of the Commission in 1925 shows (102 I. C. C., at 482), in Section 13 cases the Commission considers not only the necessity for equalizing such fares but also the point at which they should be brought together. See *Georgia Public Service Commission* v. *United States*, 283 U. S. 765, 770. The Commission recognizes that its finding approving the 1925 maximum level can hardly be said to support a higher maximum in 1942, particularly in view of the reduction in other passenger fares during the interim period (see pp. 3–4, *supra*). If the problem of inequality between inter- and intra-state commutation fares came before it at this time, the Commission might or might not require that the fares be equalized on the basis of the increase generally authorized.

This interpretation of the second paragraph of the Commission's order in Ex Parte No. 148 (R. 33) is entirely consistent with the recital in the order (R. 32):

> that the proper authorities of all States have been notified of this proceeding, and similar application has been or will be made to the regulatory authority of the respec-

tive States for permission to increase similarly petitioners' intrastate rates, fares, and charges;

Many intrastate fares are not subject to any prior order of the Commission. As has been pointed out, Section 13 orders were issued in 1920 only for those states which did not voluntarily bring intrastate fares or rates into line with the Commission's general interstate rate orders. Where no such orders are in effect, or where, as in this case, they are not controlling, the state commissions have jurisdiction.

CONCLUSION

The Commission does not construe its order in Ex Parte No. 148 as modifying the Section 13 order applicable to intrastate commutation fares in Illinois.

Respectfully submitted,

CHARLES FAHY,
Solicitor General.

ROBERT L. STERN,
Attorney.

DANIEL W. KNOWLTON,
Chief Counsel,

J. STANLEY PAYNE,
Assistant Chief Counsel,
Interstate Commerce Commission.

FEBRUARY, 1943

U. S. GOVERNMENT PRINTING OFFICE: 1943

SUPREME COURT OF THE UNITED STATES.

No. 178.—October Term, 1942.

Illinois Commerce Commission, John D. Biggs, William Parrillo, et al., appellants,
vs.
Charles M. Thomson, as Trustee of the Property of Chicago and North Western Railway Company.

Appeal from the District Court of the United States for the Northern District of Illinois.

[April 12, 1943.]

Mr. Chief Justice Stone delivered the opinion of the Court.

This case, which comes here by direct appeal under § 266 of the Judicial Code, 28 U. S. C. § 380, involves the meaning of an order of the Interstate Commerce Commission and its application to the Illinois intrastate commutation passenger fares of the Chicago & North Western Railway. By interlocutory and finally by permanent injunction, the district court below of three judges has enjoined appellants, the Illinois Commerce Commission and named law enforcement officers of the state, from taking any steps to prevent a 10% increase in such fares by appellee, trustee of the Chicago & North Western Railway Company in reorganization under § 77 of the Bankruptcy Act. — F. Supp. —. The 10% increase, if effective, would bring the fares in some instances above the maximum of two cents per mile imposed by state statute. Illinois Revised Statutes, 1941, c. 114, §§ 154-56.

The bill of complaint alleges, and the district court found, substantially as follows: Until March 7, 1942, appellee and his predecessor in interest, the Chicago & North Western Railway Company, had collected commutation fares for the intrastate transportation of passengers in Illinois as required by a report and order of the Interstate Commerce Commission entered October 6, 1925, in a proceeding under § 13 of the Interstate Commerce Act (now 49 U. S. C. § 13). The purpose and effect of that order was to require the Chicago & North Western to increase its intrastate commutation fares to substantially the same level as

the fares then in force for interstate passenger traffic, which had previously been increased by order of the Commission, and thus to remove undue preference and prejudice and unjust discrimination against interstate commerce, as well as undue preference and advantage to persons traveling in intrastate commerce on the Illinois lines of the Chicago & North Western. The order was entered upon appropriate findings. *Intrastate Rates Within Illinois*, Docket No. 11703, 102 I. C. C. 479. It directed an increase of 20% over the then prevailing rates for the intrastate commutation fares involved in this case, but provided that this increase should be "subject to a maximum of 2 cents per mile", the Commission's opinion stating that this was "in deference to the state statute". (102 I. C. C. at 485.)

On February 28, 1936, the Interstate Commerce Commission, after a general and nationwide investigation of railroad passenger fares, entered an order by which it retained its continuing jurisdiction over the Illinois intrastate commutation passenger fares here in question, by specific reference to its previous order in Docket No. 11703, although the order did not require any modification of those fares. *Passenger Fares and Surcharges*, Docket No. 26550, 214 I. C. C. 174.

In December 1941, the Commission undertook a further nationwide investigation of both freight rates and passenger fares to determine whether increases of 10%, as asked by the railroads, should be authorized in view of increased operating expenses and costs of materials and supplies. By order of January 21, 1942, in that proceeding, known as *Ex parte No. 148*, the Commission—upon findings that the increase was necessary for adequate and efficient service during the war emergency—authorized the railroads, including the Chicago & North Western, to increase passenger fares by 10%. The order further directed that "all outstanding orders, as amended, of the Commission, authorizing or prescribing interstate and intrastate fares, or bases of fares be, and they are hereby, modified, effective concurrently with the establishment of the increased fares" approved by the order, but only to the extent necessary to permit the authorized increase to be added to "the interstate and intrastate fares approved or prescribed in, or maintained or held by virtue of, said outstanding orders"; that a copy of the order be filed "in the docket of each such proceeding, including those proceedings under § 13 of the Interstate

Commerce Act enumerated in the order of February 28, 1936, in Docket No. 26550"; and "that all tariffs or supplements changing fares by authority of this order, which are maintained or held by authority of outstanding orders of the Commission, shall bear on their title pages specific reference to this order". In a report and order of March 2, 1942, in *Ex parte No. 148*, the Commission reaffirmed these findings, authorized certain increases in freight rates, and made further findings of fact in support of the increases. *Increased Railway Rates, Fares and Charges, 1942*, 248 I. C. C. 545.

The district court held that the Commission's order of January 21, 1942, by its specific references to all outstanding orders previously issued in § 13 proceedings, which would include that of 1925 in Docket No. 11703, had been made applicable to the Illinois commutation passenger fares here in question.

Acting under the purported authority of these orders, appellee, about February 6, 1942, filed with the Illinois Commerce Commission, and with the Interstate Commerce Commission, tariff schedules referring to the latter's order of January 21, 1942, and increasing by 10%, effective March 8, 1942, its previously existing Illinois intrastate passenger commutation fares. The fares proposed by these tariffs in some instances exceed the limit imposed by the Illinois two cent fare law. On February 18th the Illinois commission issued an order purporting to suspend these tariffs and the increased fares named in them until July 6, 1942, and ordered appellee not to file any new tariff or otherwise to change the previously existing fares during the period of suspension or any extension of it without the permission of the state commission. The order directed that a hearing be held by the state commission on the propriety of the proposed changes.

The district court held that the effect of the state commission's order was to prescribe for appellee the continuation of the intrastate passenger fares in force immediately before February 18, 1942, and to prohibit appellee from increasing or modifying those fares save as permitted by the state commission; that appellants have threatened and continue to threaten appellee with the prosecution of numerous proceedings in the state courts to impose upon appellee and his agents fines and penalties for failure to comply with the state commission's order; that unless appellants are enjoined from such threatened prosecutions and cumulative penalties, appellee will suffer irreparable injury.

From all this the district court concluded, as matters of law, that the Interstate Commerce Commission's order of January 21, 1942, is a valid order which modified the 1925 and 1936 orders taking jurisdiction over the intrastate commutation fares in question; and that the 1942 order, without more, authorized the increased fares prescribed in the tariffs filed by appellee. The court held that the Illinois commission's order of February 18, 1942, was invalid and without force with respect to these commutation fares because in conflict with the 1942 order of the Interstate Commerce Commission, and for the additional reason that the old fares continued in effect by the state commission are confiscatory and in violation of the Due Process Clause of the Fourteenth Amendment. The court accordingly restrained appellants from enforcing the state commission's order, and from interfering with the collection of the commutation fares prescribed by appellee's proposed tariffs.

Appellants assail the judgment of the district court on the grounds that the purport and true meaning of the Interstate Commerce Commission's 1942 order was not to order into effect Illinois intrastate fares superseding those previously in force, but only to assent to increased rates when and if permitted by the state commission, which it has not done; that the Interstate Commerce Commission's order, if intended to compel increases in intrastate rates, is not supported by adequate findings (cf. *Florida* v. *United States*, 282 U. S. 194); and that, so far as the judgment below rests on the alleged confiscatory character of the pre-existing rates, the finding of confiscation is not supported by the record, and appellee has not pursued the administrative remedy available before the state commission, as is prerequisite to equitable relief.

The meaning and appropriate application of the Interstate Commerce Commission's order are undoubtedly obscure. We have heard exhaustive argument and examined elaborate briefs by the parties to this litigation and by the City of New York as amicus curiae, endeavoring to throw light on its true meaning. Like arguments have been made, in a cause pending in the New York state courts,[1] to determine the application of this order to intrastate standard passenger fares of the Long Island Railroad.

[1] The Supreme Court of New York concluded that the Commission's order was not intended to direct a 10% increase in those intrastate rates. Matter of Transit Commission v. Long Island R. R. Co., 178 Misc. 290. The court, how-

As we were in doubt as to the intended scope of the Commission's order, and the Commission had not filed a brief or otherwise intervened in this litigation, we requested a brief on its behalf discussing the meaning and application of its order. In compliance with our request it has filed a brief in which it takes the position that the 1942 order was not intended, and should not be construed, to direct a 10% increase in the Illinois intrastate commutation fares established in 1925. Although the brief is not wholly free from the obscurity surrounding the order itself, the Commission's ultimate position that the order is inapplicable to these particular commutation fares is one which, under all the circumstances of the case, we accept.

The doubt concerning the application of the 1942 order arises from uncertainty as to the extent to which its broad language is to be deemed restricted when read with the earlier orders of the Commission relating to intrastate rates, and in the light of the nature of the functions which the Commission is called on to perform in prescribing such rates. On its face the order provides broadly that: "all outstanding orders, as amended, of the Commission, authorizing or prescribing interstate and intrastate fares . . . are hereby, modified, effective concurrently with the establishment of the increased fares herein approved, only to the extent necessary to permit the increase herein authorized to be added to the interstate and intrastate fares approved or prescribed in . . . said outstanding orders". Whether this, without more, was intended or operates to direct a 10% increase of appellee's intrastate commutation fares in Illinois, so as to preserve the established relationship between them and interstate fares, rather than intended to permit appellee to obtain the 10% increase only with the assent of the state commission, is the question.

The position of the Interstate Commerce Commission is in substance that the order is not to be construed as prescribing Illinois intrastate commutation fares for the Chicago & North Western because the order was unattended by the procedure which the Commission regards as the appropriate basis for such an order,

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ever, suggested that an application might be made to the Interstate Commerce Commission for a clarification of its order to remove any doubt. On such application the Commission refused to clarify the order, and on rehearing the court adhered to its original decision. I. C. C. Order, entered in Ex parte 148, April 6, 1942; 107 N. Y. L. Journal, p. 1958, May 8, 1942. The decision was affirmed by the Appellate Division, 265 App. Div. 847, and the case is now pending in the New York Court of Appeals.

and consequently that the Commission did not have in mind or intend that the order should have that effect.

It has long been established that the Interstate Commerce Commission, under § 13(4) of the Act, has power to supersede an intrastate rate by prescribing in its stead a new rate which the Commission finds necessary to remove undue or unreasonable prejudice to interstate commerce resulting from the maintenance of the intrastate rate. It may rightly establish such a modification of the intrastate rate only upon notice to the intrastate carriers concerned, and hearings, followed by findings showing prejudice to interstate commerce. Upon such findings the statute makes it the duty of the Commission to prescribe the just and reasonable intrastate rate found necessary to remove the prejudice. *Wisconsin R. R. Comm.* v. *C., B. & Q. R. R. Co.*, 257 U. S. 563; *Commission* v. *Texas & N. O. R. Co.*, 284 U. S. 125; *United States* v. *Louisiana*, 290 U. S. 70. And for purposes of this case we may assume, without deciding, that intrastate rates which have once been prescribed by § 13 orders may be modified by a blanket order raising or lowering the level of intrastate and interstate rates, even though the Commission makes no new findings of discrimination but leaves that question subject to later inquiry upon applications filed in particular cases. Cf. *United States* v. *Louisiana*, *supra*, 73-79; *New England Divisions Case*, 261 U. S. 184, 196-201.

In 1920 the Interstate Commerce Commission authorized a general increase of 20% in interstate passenger fares, establishing a countrywide standard passenger fare of 3.6 cents a mile. *Increased Rates, 1920*, 58 I. C. C. 220 and 302. The Commission later instituted the § 13 proceeding which resulted in its 1925 order increasing by 20%, subject to a 2 cent per mile maximum, the Illinois intrastate commutation fares of the Chicago & North Western, in order to remove the prejudice of such fares to interstate commerce. *Intrastate Rates Within Illinois*, 102 I. C. C. 479. This was followed by the 1936 order directing a general reduction of interstate passenger fares. By this order the Commission, as a means of increasing passenger traffic, reduced maximum standard Pullman fares to three cents and coach fares to two cents a mile. And to prevent intrastate fares subject to the earlier § 13 orders from being higher than the new interstate maximum fares, the Commission ordered all outstanding § 13 orders to be modified to the extent necessary to permit the new fares to become effective.

Passenger Fares and Surcharges, 214 I. C. C. 174. While this order affected many intrastate fares which had previously been subject to § 13 orders, it was without effect on Illinois commutation fares on the Chicago & North Western, which had been no greater than the maximum of two cents a mile. Thus the Illinois commutation fares involved in the present case, established in 1925, were not reduced between 1925 and 1942.

It is the position of the Commission that, since the 10% increase of 1942 if mandatory would raise these Illinois intrastate commutation fares (unlike the standard fares) above the level set by the § 13 order of 1925, and as the Commission made no special findings justifying such an increase of the level of intrastate fares, the 1942 order is not to be understood to have the effect ascribed to it by the district court. The Commission points out that even if the need of equivalence of intrastate and interstate fares has not changed since 1925, the Commission is concerned not only with the necessity for maintaining the equivalence, but also with the particular point at which the fares should be brought together. The Commission intimates that its findings establishing the 1925 maximum level of intrastate fares would not be regarded by it as sufficient support for a still higher level in 1942. It urges that the absence of findings supporting a higher level therefore indicates that its 1942 order was not intended, without more, to increase by 10% the Illinois intrastate commutation fares.[2]

The Interstate Commerce Commission is without jurisdiction over intrastate rates except to protect and make effective some regulation of interstate commerce. In view of the Commission's construction of its order, and the grounds upon which it rests, we can only conclude that there is at least serious doubt whether the 1942 proceeding and the order which resulted from it were ever intended by the Commission to increase the intrastate rates in question. Since the Commission alone is authorized to wield the constitutional power to set aside state-established intrastate rates by prescribing intrastate rates itself, state power cannot rightly

[2] The brief filed by the Commission in this Court to assist in discovering the intended meaning of the order in Ex parte No. 148, states that "the 1942 increase may well be mandatory" as to standard intrastate passenger fares overid by prior outstanding § 13 orders, as in the New York case discussed in note 1, *supra*. This is said to be because, in the 1936 proceeding, such fares were reduced, and because the 10% increase of 1942 would only raise them to a level well within the maximum prescribed for such fares in § 13 proceedings in 1920.

be deemed to be supplanted so long as the Commission's exercise of its authority is left in serious doubt. *Arkansas Comm.* v. *Chicago, etc. R. R.*, 274 U. S. 597, 603. And where the applicability of the order is as doubtful as it is in this case, we should not feel justified in disregarding the Commission's disclaimer in this Court of all intention to override Illinois state law by its 1942 order—especially in view of the fact that in the § 13 proceeding in 1925 the Commission had framed its order in deference to the two-cent fare law prevailing in Illinois.

It is regrettable that prolonged litigations should have resulted because of the absence from the Commission's order of a sentence more precisely defining its scope, or of a clarifying order which could have been entered at any stage of the pending litigations.

Since we accept the Commission's conclusion that the 1942 order is inapplicable, it is unnecessary for us to consider whether, as appellants contend, the order if applicable would be open to collateral attack in this proceeding for the insufficiency of the Commission's findings to support it, or whether that issue may be litigated only in a suit to set aside the order brought against the United States as prescribed by the Urgent Deficiencies Act. 38 Stat. 219, 28 U. S. C. § 46.

Only a word need be said of the district court's finding of confiscation. Appellants filed no answer to the bill of complaint and no evidence was taken in the cause. Judgment in favor of appellee was entered upon appellants' motion to strike the complaint and dismiss the cause, and upon the prayer of the bill for a permanent injunction. The only support for the finding of confiscation is in the general allegations of the complaint that the existing intrastate commutation fares complained of are confiscatory, and more particularly that these fares are not adequate to compensate for the cost of the particular service.

Apart from the insufficiency of such allegations, when not buttressed by convincing proof, to sustain an injunction setting aside rates as confiscatory, see *R. R. Comm'n* v. *Pacific Gas Co.*, 302 U. S. 388, 401, it appears that when the present suit was brought the state commission had ordered a hearing before it concerning the propriety of appellee's proposed increase of the existing, allegedly confiscatory, fares. There is no contention and no finding that appellee's attack on the existing fares as confiscatory

was not open for consideration before the commission. The equitable remedy sought by appellee in court should have been denied because of his failure first to pursue the administrative remedy thus afforded. *Gilchrist* v. *Interborough Co.*, 279 U. S. 159, 208-09; *Natural Gas Co.* v. *Slattery*, 302 U. S. 300, 310-11. There are no circumstances of peculiar urgency alleged, and no other ground is disclosed by the record which would warrant a federal equity court in dispensing with this salutary requirement.

Upon this record the district court should have declined to pass on the merits of the confiscation issue.

Reversed.

Mr. Justice RUTLEDGE took no part in the consideration or decision of this case.

SUPREME COURT OF THE UNITED STATES.

No. 178.—October Term, 1942.

Illinois Commerce Commission, John D. Biggs, William Parrillo, et al., appellants,
vs.
Charles M. Thomson, as Trustee of the Property of Chicago and North Western Railway Company.

Appeal from the District Court of the United States for the Northern District of Illinois.

[April 12, 1943.]

Mr. Justice Roberts.

I am of opinion that the judgment should be affirmed.

This case is important not so much because of the relative rights of the parties as of the principles announced by the court which I think are likely to produce unfortunate results in later cases.

First. The meaning and scope of the Interstate Commerce Commission's order is, in my view, clear. It expressly included the earlier § 13 order affecting the intrastate rates of the Chicago and North Western which are in question. I could understand the assertion that the order is obscure if its purported application were to intrastate rates not specifically mentioned in the order itself. But here the Commission seems *ex industria* to have referred to an earlier § 13 order so as to leave no doubt of its purpose.

Second. Even if the order were obscure, any party in interest could have obtained a clarification by application to the Commission. It is somewhat difficult to understand why the Commission, in response to an informal application, refused to vouchsafe any clarification of the order in the case of New York intrastate rates.

Third. It seems to me inadmissible to permit the Commission, in a litigation such as the present, to suggest that its order was not intended to cover the intrastate rates in question because, forsooth, the order is not supported by requisite findings. I fail to see the fairness or equity of permitting parties to struggle for months or years over the meaning or scope of an order which happens to be involved in a collateral proceeding and then permit the Commission to appear in the litigation and attempt to explain why its order does or does not cover the situation disclosed.

Fourth. I also think it inadmissible to litigate, in a collateral proceeding such as this, the question of the adequacy of the support of the Commission's order in the record made before the Commission. Congress has provided a method whereby orders not entered in accordance with the provisions of the Interstate Commerce Act may be set aside or enjoined by a petition to a District Court of the United States. This method of attack is available to any party in interest or any intervenor before the Commission. It is wrong, in my judgment, to permit a state commission, or any other party, to forego the method prescribed by the Urgent Deficiencies Act for enjoining or setting aside a Commission order on such ground as is here asserted and to act in the teeth of the order, reserving an attack on the findings, or lack of findings, to support the order until its regulations are challenged in an independent proceeding. In such a proceeding as this I think the order should be treated as binding until modified or set aside in the manner provided by federal law.